

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

5 LEHMAN BROTHERS HOLDINGS, INC., CASE NO. 08-13555(JMP)
6 ET AL, (Jointly Administered)
7 Debtors.

8 - - - - - x

9 In the Matter of:

10 LEHMAN BROTHERS, INC., CASE NO. 08-01420(JMP)
11 Debtor. (SIPA)

12 - - - - - x

13 U.S. Bankruptcy Court
14 One Bowling Green
15 New York, New York

16
17 October 24, 2013

18 10:01 AM

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20 B E F O R E :

21 HON. JAMES M. PECK

22 U.S. BANKRUPTCY JUDGE

23

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25 ECRO - K. HARRIS

1 HEARING Re: Plan Administrator's Omnibus Objection to Claims
2 Filed by Deborah E. Focht (ECF No. 34303)

3
4 HEARING Re Motion of the Federal Housing Finance Agency and
5 the Federal Home Loan Mortgage Corporation to stay Lehman
6 Brothers Holdings, Inc.'s Motion to Classify and Allow the
7 Claim Filed by the Federal Home Loan Mortgage Corporation
8 (Claim No. 33568) in LBHI Class 3 (ECF No. 40570)

9
10 HEARING Re Motion to Classify and Allow the Claim Filed by
11 the Federal Home Loan Mortgage Corporation (Claim No. 33568)
12 in LBHI Class 3 (ECF No. 40066)

13
14 HEARING Re Motion of CarVal Investors, LLC for Leave to
15 Examine LBHI Pursuant to Federal Rule of Bankruptcy
16 Procedure 2004 (ECF Nos. 40469)

17
18 HEARING Re Motion of Davidson Kempner Capital Management
19 LLC, as Investment Advisor for Leave to Examine LBHI
20 Pursuant to Federal Rule of Bankruptcy Procedure 2004 (ECF
21 No. 40532)

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25 Transcribed by: Sheila Orms

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1 P R O C E E D I N G S

2 THE COURT: Be seated, please, good morning.

3 MR. WIN: Good morning.

4 Good morning, Your Honor, Zaw Win, Weil Gotshal &
5 Manges for Lehman Brothers Holdings, Inc.

6 The first matter on today's agenda is the plan
7 administrator's objections to the two remaining claims of
8 Ms. Deborah Focht. I know the Court has a busy schedule
9 today, so before we get started, I think it might make sense
10 to just check and see if Ms. Focht is in the courtroom or on
11 the line.

12 THE COURT: Is Deborah Focht in the courtroom or
13 is there an attorney on her behalf in the courtroom?

14 (No response)

15 THE COURT: There's no response. Is Deborah Focht
16 on the telephone, or is there an attorney representing
17 Deborah Focht on the telephone?

18 (No response)

19 THE COURT: All right. Also no response. Please
20 proceed.

21 MR. WIN: In that case, unless the Court has any
22 specific questions, the plan administrator would rest on its
23 papers, and just note quickly that Ms. Focht has had more
24 than an adequate opportunity to represent herself in this
25 matter. The Court's held three hearings in which she has

1 participated in, and she submitted four separate pleadings.

2 As set forth in the plan administrator's papers,
3 the plan administrator doesn't view her two remaining
4 claims, which are Claim No. 34381 against LBHI and 34380 as
5 having any merit, and so we would respectfully request that
6 the Court disallow and expunge those claims with prejudice.

7 THE COURT: Those claims are disallowed and
8 expunged.

9 MR. WIN: Thank you. The next matter on the
10 agenda is being handled by Arnold & Porter.

11 MR. PEREZ: Good morning, Your Honor, Alfredo
12 Perez on behalf of the plan administrator. I think the next
13 matter on the agenda is a stay motion that Mr. Canning's
14 going to present.

15 THE COURT: All right.

16 MR. CANNING: Good morning, Your Honor.

17 THE COURT: Welcome back.

18 MR. CANNING: Thank you. It's good to be here. I
19 guess, yes, we have a couple of motions on today. The first
20 in order would be the motion that's been made by the Federal
21 Housing Finance Authority to stay the proceedings in respect
22 to the motion to classify the claim of Freddie Mac and FFHA
23 from a Class 1 priority claim to a Class 3 claim.

24 Before we get started, I would like to introduce
25 my colleague at the table, Nancy Milburn from Arnold &

1 Porter and seated next to her is Mark Lanman, who is with
2 the Lanman Corzi firm, which is representing Freddie Mac.

3 Okay. Your Honor, just very briefly by way of
4 background and you may be, you know, well familiar with
5 this, but on September 6th, 2008 very shortly before the
6 commencement of the Lehman bankruptcy proceedings, pursuant
7 to the authority that was granted under the HERA Act, what
8 we refer to as the HERA Act, which is the Housing and
9 Economic Recovery Act of 2008, Freddie Mac, along with
10 Fannie Mae was placed under a conservatorship of the FHFA.

11 As Your Honor is aware, the -- Freddie Mac is a
12 government sponsored enterprise that provides liquidity,
13 stability and affordability to the U.S. housing markets, and
14 frankly is critically an important centerpiece to the
15 financial health of the U.S., and it's real estate and
16 capital markets.

17 In enacting HERA and I'm certainly not going to go
18 for a long recitation of HERA, but Congress did grant the
19 FHFA very, very broad and strong powers, pursuant to its own
20 separate statutory scheme, in order to address and resolve
21 Freddie Mac and Fannie Mae.

22 Including by granting them very broad powers with
23 respect to the ability to avoid transfers made and the
24 incurrence of obligations that were made by third parties
25 with the intent to hinder delay or fraud, either the

1 regulated entities Freddie Mac and Fannie Mae or FHFA.

2 In accordance with these powers, Freddie Mac filed
3 a proof of claim, timely filed a proof of claim for the
4 amount of \$2.1 billion plus interest on account of two loans
5 that were made by Freddie Mac to LBHI on August 19th and
6 August 20th of 2008, and those loans aggregated \$1.2
7 billion.

8 In connection with that proof of claim, Fannie Mac
9 and FHFA is sort of the priority recovery pursuant to the
10 provisions of Section 4617(b)(15) of the HERA Act, which
11 allows for, under Subsection D for the rights of FHFA in
12 respect of any avoidable transfers of the incurrence of any
13 obligations to receive a priority recovery, and that it says
14 specifically, that the rights and powers with respect to
15 those actions are superior in all respects to the rights of
16 a Chapter 11 trustee, and any other party in a bankruptcy
17 proceeding.

18 So that notation, if you will, was put on the
19 front page of the proof of claim, and there was an
20 attachment in some specificity within to what exactly those
21 powers and rights were.

22 Also just very summarily, because it's in all of
23 our papers in connection with the confirmation of the
24 debtor's amended plan, third amended plan, there were
25 discussions held between LBHI and FHFA and Freddie Mac,

1 where we entered into a plan stipulation pursuant to which
2 LBHI agreed to amend their third amended plan just before
3 confirmation, to modify the definition of a priority non-tax
4 claim. So that it reads that any creditor holding a claim
5 that's entitled to a priority under Section 507 of the
6 Bankruptcy Code or under Section 4617(b)(15) of HERA, would
7 receive a hundred percent recovery as a priority claim in
8 the bankruptcy case.

9 That agreement and the stipulation was actually
10 embedded in the plan, the plan was confirmed, and pursuant
11 to the stipulation there was simultaneously set aside \$1.2
12 billion in a separate cash reserve to be held pending
13 resolution of the HERA claim and its priority.

14 Recently, and why we're here before Your Honor
15 today, is four years after we filed that claim, a little bit
16 more than four years after we filed that claim, the debtors
17 filed a motion to, in effect, reclassify this claim,
18 asserting that it should be reclassified from a Class 1 LBHI
19 priority claim to a Class 3 LBHI senior unsecured claim.

20 We take exception with that, obviously, Your
21 Honor, and that's what our opposition was in respect of that
22 motion. And we also filed a motion to withdraw the
23 reference as to that particular motion to classify in our
24 opposition, and hence, finally long-winded get to the
25 current motion which is to stay these proceedings while the

1 district court resolves whether the reference should be
2 withdrawn.

3 THE COURT: May I just break in and ask you --

4 MR. CANNING: Sure, Your Honor.

5 THE COURT: -- a background question.

6 MR. CANNING: Yeah.

7 THE COURT: Prior to prosecuting the motion to
8 stay --

9 MR. CANNING: Uh-huh.

10 THE COURT: -- did you or others acting on behalf
11 of your client explore the possibility of some kind of
12 coordinated approach with the debtor that would avoid this
13 litigation as it relates to the stay, and be in the more
14 nature of a consensual approach to dealing with the
15 relationship between the motion to withdraw reference and
16 this particular proceeding?

17 MR. CANNING: Yes, Your Honor. We --

18 THE COURT: Can you describe that, please?

19 MR. CANNING: Sure. There have been lots of
20 discussions ongoing over the last several years between
21 LBHI, Freddie Mac, Fannie Mae, and the FHFA on all of the
22 claims, just as a background.

23 With respect to these particular claims, we did
24 probably in the spring start engaging pretty seriously in
25 conversations to see if there was a possibility to try to

1 resolve this claim consensually as to its priority.

2 Understanding that there is no dispute with respect to the
3 underlying obligation, and the fact that the loan was made,
4 and the funds should be repaid, and that this is a valid
5 claim.

6 But we did engage in discussions with respect to
7 seeing if we could address the priority nature and a
8 recovery in that regard. We had certainly some meetings
9 between Mr. Perez and I, we had one or maybe two meetings
10 where representatives of the FHFA and myself attended with
11 some folks from LBHI and Mr. Perez, and ultimately decided
12 that we would try to see if we could do a meditation.

13 In that regard, we talked about timing for the
14 mediation, we talked about a mediator. Candidly we agreed
15 upon a mediator. There then became an issue with respect to
16 the timing of the mediation. This was in, I think if I
17 recall, and Mr. Perez can correct me, I think it was in June
18 and sometime in June we had this discussion. And due to
19 other, frankly other cases that the FHFA was tied up in, and
20 the need to do what we believe was sufficient discovery,
21 because we even exchanged a proposed list of informal
22 discovery to try to inform both parties to make the
23 mediation process as successful as we could. So we did each
24 put together sort of a checklist of those items that we
25 thought we would need to exchange in discovery in order to

1 make that productive.

2 And so in order to get all of that together and to
3 meet some other time constraints, the representative of FHFA
4 said ideally he could do it probably early in December. FH
5 -- I'm sorry, LBHI indicated that they would like -- they
6 would prefer to do it in August or September. We wound up,
7 I spoke directly with the agreed upon mediator to get his
8 schedule. He had time available the last week in October
9 and the first week or so in November. I counseled -- I went
10 back to FHFA, they were agreeable to doing it, and moving it
11 up to early November, let's say the first week in November,
12 and I communicated that back to counsel for LBHI, and
13 frankly, that's where it ended. They indicated that they
14 were -- did not want to go forward with mediation at that
15 point.

16 Roughly 60 days went by or so, Your Honor, and
17 then we got this motion filed. So I didn't mean again to be
18 so laborious, but that is the sequence of what happened
19 since probably the spring of this year.

20 THE COURT: What I was actually asking you,
21 although this was a very helpful discussion, was whether you
22 had engaged in any conversations with the plan administrator
23 or its representatives in reference to the staging of these
24 proceedings --

25 MR. CANNING: Oh, sorry, Your Honor.

1 THE COURT: -- as it relates to the district court
2 and a motion to withdraw reference, and having a hearing on
3 the merits of the reclassification motion take place today.
4 Because the motion for stay is effectively driven by the
5 calendaring of the coercive motion.

6 MR. CANNING: That's correct, Your Honor. No, in
7 fact, we have not had any specific discussions about that.
8 This is all -- happened pre -- with some rapidity over the
9 last week or two, and we really haven't discussed the timing
10 of that.

11 THE COURT: All right. Fine. I'm just going to
12 interject something which is not directly related to the
13 argument, but your comment concerning other mediation
14 activity involving FHFA causes me to disclose for record
15 purposes that I have served as many may know as the plan
16 mediator in Residential Capital's bankruptcy, the case which
17 is pending currently before my colleague, Judge Glenn. And
18 during the course of that very extensive undertaking, I did
19 have a series of meeting with representatives of FHFA. None
20 of those meetings touched upon the issue presently before
21 the Court, nor did it deal with any issues of claim priority
22 that are before the Court today.

23 We did, however, have conversations that related
24 generally to the claims of FHFA against both Residential
25 Capital and its ultimate parent company. I won't say more

1 than that, except to say that I don't believe that anything
2 that I learned in the process of mediating that aspect of
3 the Res Cap disputes has any material bearing on what's
4 going on here now.

5 MR. CANNING: I understand.

6 All right. Your Honor, if I turn to the
7 sequencing, I guess I would proceed with the motion on the
8 stay, if that is what Your Honor would like, and we'll deal
9 with that first, and then based upon how Your Honor would
10 then like to proceed, we can move forward with the motion to
11 classify and the opposition.

12 THE COURT: That's fine. And why don't you just
13 proceed.

14 MR. CANNING: Okay. Well, Your Honor, just to
15 step back a little bit, as set forth in the motion to
16 withdraw the reference, FHFA and Freddie Mac believes that
17 the withdrawal of the reference is, in fact, mandatory under
18 157(d) of Title 28. To the extent that that provision
19 requires that the district court shall withdraw a proceeding
20 if the resolution of the proceeding requires consideration
21 of Title 11 and other federal laws of the U.S., other non-
22 bankruptcy federal laws.

23 In this regard, Your Honor, I want to note first
24 that Freddie Mac and FHFA's motion to withdraw was certainly
25 not filed for any strategic or tactical purpose. This is

1 not a Stern v Marshall request if you will, for lack of a
2 better way to characterize it. It was done specifically
3 because the limited issues that were posed in the motion to
4 classify, the debtors, LBHI's motion, the specific limited
5 issues are first the interpretation of HERA, and what are
6 the rights and powers under HERA that have been granted to
7 FHFA. So it's really the interpretation of a non-bankruptcy
8 federal statute.

9 THE COURT: Let me ask you this question, however.

10 MR. CANNING: Yes, uh-huh.

11 THE COURT: It is my understanding that the
12 statutory provisions in question are substantially similar
13 in form and content to provisions of the Bankruptcy Code
14 and/or to applicable law typically construed by bankruptcy
15 court. In what respect, does it make sense for there to be
16 a mandatory withdrawal of the reference as to matters that
17 are almost uniquely within the expertise of the bankruptcy
18 bench in this district?

19 MR. CANNING: Your Honor, I think it -- and this
20 in part is similar to the response that I -- that LBHI posed
21 to our motion, which was that, you know, Section 507 simply
22 doesn't provide a priority and the Bankruptcy Code is clear,
23 if you want a priority, it needs to be under Section 507.
24 And if it's not, then there's no priority. So therefore,
25 there's no need to interpret the HERA statute, there's no

1 need to address the intersection between the Bankruptcy Code
2 and the HERA statute, because it's all resolved, it's all
3 within the four corners of the Bankruptcy Code.

4 Your Honor, I think that FHFA's view is that
5 that's a simplistic approach. In enacting HERA, much as
6 they did when they enacted FIRREA which was an almost
7 identical statute, only was in respect of the oversight of
8 federal insured banks, as opposed to Fannie and Freddie, but
9 they also set up a separate statutory regime or scheme to
10 deal with the resolution of banks.

11 Just like in our case, they set up a separate
12 statutory scheme to deal with the resolution, addressing and
13 resolving Freddie Mac and Fannie Mae. It's, if you will,
14 almost like a specialized insolvency regime.

15 THE COURT: Yes, that's true, but that specialized
16 insolvency regime filed a proof of claim in the largest
17 bankruptcy case in history, which has been pending here for
18 over five years, participated in the confirmation process,
19 and entered into the stipulation that you referred to modify
20 the plan. And so everything that we're talking about is
21 almost uniquely subject to this Court's jurisdiction, and
22 the history of case administration that leads up to today's
23 argument.

24 MR. CANNING: Well, indeed, Your Honor, but what
25 we're really talking about is does Section 4617(b)(15)(D)

1 which is a non-bankruptcy federal statute, does that
2 independently give FHFA a right to a recovery in respect of
3 transfers made or obligations incurred, and that right to
4 recover that property is superior to the rights by statute,
5 superior to the rights of a Chapter 11 trustee and a debtor.

6 And I don't take exception with the fact that Your
7 Honor has dealt with a lot of situations that may be
8 similar, but nevertheless, the rule is pretty clear under
9 157(d) if it's a question of interpretation of a non-
10 bankruptcy federal statute, or the intersection of the
11 rights and powers under the Bankruptcy Code in that statute,
12 which this issue clearly is, you know, we didn't pose this
13 issue. They posed this issue the way they posed it.

14 They said without regard to the Bankruptcy Code,
15 without regard to the plan, without regard to the
16 stipulations, in our view, this claim should be reclassified
17 now. It should now be a Class 3 senior unsecured claim and
18 not a priority claim. That goes directly to the heart of
19 what does Subsection D mean of the HERA statute.

20 THE COURT: Well, does it? I'm not so sure that
21 it does, and I invite you to explore that assertion further.
22 It seems to me that there is a fundamental distinction in
23 terms of the purpose of the mandatory withdrawal of the
24 reference, as between a non-bankruptcy statute that is
25 arcane or foreign to the jurisdictional activities of the

1 bankruptcy court. In other words, statutes that are more
2 typically construed by district courts, tax issues,
3 environmental law issues, issues that may relate to the
4 securities laws, I'm simply providing some random examples,
5 where those issues predominate.

6 But here, we have a fully developed claim
7 reconciliation process that has been ongoing in this
8 bankruptcy case for at least four years, in a case that has
9 been pending for over five years, in which every single
10 claim of every description you can imagine has been
11 subjected to the same regime.

12 Moreover, the non-bankruptcy law that you are
13 describing to me is completely familiar to me in terms of
14 the precepts that are to be construed. There is nothing
15 about this law that I find strange or difficult to construe.

16 And so I wonder out loud to you, and you can now
17 respond, whether there is, in fact, a likelihood of success
18 that you will achieve a mandatory withdrawal of the
19 reference, given this history and fact pattern, particularly
20 since in the history of this bankruptcy case, to my
21 knowledge, there has never been a withdrawal of the
22 reference, despite various efforts to achieve that over the
23 last five years.

24 So that pattern of failure is one that I think
25 you're going to have to at least consider as you touch the

1 likelihood of success prong on your motion for stay.

2 MR. CANNING: I understand, Your Honor, I
3 certainly do. And I don't take exception with the quality
4 of the duration of the claims process. And I know, and I
5 know from my own observations that you have indeed dealt
6 with every type of claim almost imaginable in this
7 bankruptcy.

8 I do think, just to say, that this isn't
9 necessarily related to a claim and whether there is a claim
10 or whether there is not a claim. It is uniquely whether or
11 not there is a priority to which the government is entitled
12 by reason of Congress' intent as expressed in the HERA
13 statute. And that isn't -- doesn't fall within the claims
14 process, and the procedures, and the like, and it's not tax,
15 and it's not environmental. And I certainly understand
16 that.

17 But nevertheless, it is a case of first
18 impression. It is a substantial issue. It's a material
19 issue, and it's one that we think, and again, this is not
20 tactical, but we think that 157(d) does mandate that the
21 reference be withdrawn.

22 Now, we said that, I guess I need to touch upon
23 the likelihood of our success, which I understand there's a
24 challenge here of what you just said about the history of
25 failures here. But --

1 THE COURT: I'd like to modify what I said,
2 because there is one exception. There is a case which is
3 currently pending in the district court before District
4 Judge Berman, that involves certain disputes with the
5 Internal Revenue Service. That case was commenced here as
6 an adversary proceeding, and all parties stipulated --

7 MR. CANNING: I see.

8 THE COURT: -- that the matter should be referred
9 back to the district court. I might add that that case has
10 been pending, I believe, for four years. So I am quite
11 pleased actually that I haven't had to deal with it.

12 MR. CANNING: Okay. Well, as Your -- I mean, as
13 Your Honor is aware, and this touches upon what I said
14 earlier about the separate statutory scheme, banks can't go
15 into bankruptcy, hence the FDIC has FIRREA, while similarly
16 Freddie Mac and Fannie Mae can't go into bankruptcy, and
17 Congress created the HERA statute, and the regime that's
18 imposed upon that process under the HERA statute.

19 So we do think there is a separate statutory
20 scheme for resolving these federal instrumentalities that is
21 separate from and the rights and powers granted under that
22 statute and pursuant to that scheme are separate from the
23 powers under the Bankruptcy Code. And again, under
24 4617(b)(15)(D) are superior to the Bankruptcy Code, and the
25 rights of all parties in a bankruptcy proceeding, with

1 respect to certain activities, such as the avoidance of
2 claims and recoveries and respect thereof.

3 Now, LBHI makes a big point about, we don't need
4 to interpret the HERA statute because it's all decided under
5 507, and if it's not under 507, there's no priority, and
6 that's the end of it. And they cite in support of that the
7 fact that pursuant to the Crime Control Act of 1990,
8 Congress did a couple of things. And one thing they did is
9 they imposed a new provision into FIRREA which was Section
10 1821(d)(17) which is virtually identical to the Section
11 4617(b)(15) in HERA, with respect to the avoidance of claims
12 and the right to pursue permissively transferees and the
13 superior rights in that regard under Subsection D of that
14 provision.

15 And separately, but under the same bill in the
16 Crime Control Bill, they amended 507 of the Bankruptcy Code
17 to put in (a)(9), and their point, obviously is suggesting
18 that Congress was well aware of how to amend 507 and the
19 importance of 507, and if they wanted to grant the FDIC a
20 priority recovery in respect to those avoidance claims, that
21 they could've done that and they didn't. And therefore,
22 there was no intent that Congress expressed to provide any
23 priority over any other priority claimants under 507.

24 Your Honor, we think frankly that LBI -- LBHI
25 misses the point there. They didn't otherwise -- Congress

1 didn't otherwise amend 507 because they really didn't need
2 to. Once again it -- the FD -- the FIRREA statute sets its
3 own statutory scheme for banks, much like HERA does for
4 Fannie and Freddie.

5 And with respect to priority regarding recoveries
6 in respect of transfers made and obligations incurred to the
7 extent that those were undertaken with the intent to hinder,
8 delay, or defraud, the applicable regulated entity would be
9 at the bank under FIRREA or Freddie Mac under HERA. If that
10 occurs, then it's got its own built in rights and powers,
11 which is to recover those funds and those rights are
12 superior to the rights of any other party in a bankruptcy.

13 As to 507, what they did in (a)(9) was different.
14 507(a)(9) as Your Honor is well aware is to provide almost
15 within the corollary bankruptcy of the bank holding
16 companies that owned the federally insured institution that
17 whereas it being resolved under FIRREA, that to the extent
18 that that bank holding company had defaulted in connection
19 with the capital maintenance agreement prior to bankruptcy,
20 and then even in the bankruptcy, didn't cure it under 365(o)
21 of the Bankruptcy Code.

22 That that resulting claim, that that resulting
23 claim because of that default under the executory contract
24 would be accorded a statutory priority under 507; that claim
25 doesn't require any bad intent or no hindrance or delay or

1 defrauding of FDIC, it just -- it's just a claim that arises
2 by means of a default on an executory obligation, that
3 Congress wanted to impose in the Bankruptcy Code to protect
4 the taxpayers and the safety and soundness of financial
5 institutions.

6 So, in our view, Your Honor, what the Crime
7 Control Act demonstrates is that Congress decided it needed
8 to do two things in order to protect the taxpayers and the
9 safety and solvency of federally insured institutions.

10 On the one hand, to put a new section in FIRREA,
11 which gave these very broad powers to the FDIC to go after
12 third parties, this isn't like a debtor recovering its own
13 transfers or avoiding its own incurrence of obligations, it
14 gave them the party to go after third parties who hindered,
15 delayed, or defrauded the federally insured bank, in order
16 to get recoveries for the benefit of the agency, and you
17 know, for the government.

18 In addition, in addition to importing its own
19 rights and powers with statutory priorities over the
20 Bankruptcy Code, it separately amended 507 to add (a)(9) so
21 that it could also get the other end of the spectrum, it
22 could go after the bank holding company to the extent that
23 it defaulted on its capital maintenance obligations to the
24 institution.

25 And it determined on balance that those two

1 changes implemented simultaneously, separate powers, broad
2 powers to the FDIC, and a priority recovery against a bank
3 holding company that is in bankruptcy. Again, the
4 institution -- banks can't go into bankruptcy, that that
5 together was sufficient protections and that's what they
6 wanted to implement as a scheme to facilitate addressing and
7 resolving those financial institutions.

8 So, I mean, in our view, we think we're going to
9 prevail because we think that is, in fact, what is intended
10 by FIRREA and similarly intended under the HERA statute, and
11 the fact that they amended a 507(a)(9) in that case, and
12 they didn't in HERA because Freddie doesn't have a holding
13 company that's got a capital maintenance agreement or
14 anything like that. There was no need to address a
15 complimentary change under 507.

16 All they had to do is put in those rights and
17 powers, those broad rights and powers under 4617(b)(15)(D)
18 that gives them priority rights, as against a Chapter 11
19 trustee or any other party in a bankruptcy case.

20 So to the contrary, we don't think you can just
21 simply say, oh, it's not in 507 of the Bankruptcy Code, if
22 it's not 507 of the Bankruptcy Code, it can't be a priority.
23 I mean, some of the cases that they cite were really dealing
24 with types of claims, and were they -- did they fit under
25 one of the categories under 507, not whether there is a --

1 sort of a parallel statutory scheme that Congress has
2 intended to have broad powers to protect the government and
3 the taxpayers and that those rights are secured.

4 THE COURT: Understood, Mr. Canning, but we're in
5 a bankruptcy case, and whichever court is construing the
6 question of the proper classification of the FHFA claim will
7 be construing the priority scheme of the Bankruptcy Code.

8 What you'll be arguing presumably is that
9 notwithstanding the fact that 507 doesn't include an
10 expressed priority that somehow you're entitled to trump
11 other creditors on the strength of applicable non-bankruptcy
12 law, but can you cite me any case in which a bankruptcy
13 court or a district court sitting as a bankruptcy court, has
14 found that a creditor is entitled to priority other than
15 pursuant to the priority scheme of the Bankruptcy Code?

16 MR. CANNING: Well, Your Honor, I mean, this is a
17 case of first impressions. I mean, there are circumstances
18 where, in effect, priorities are granted. Look, I mean, if
19 this -- if they had reorganized and emerged as opposed to a
20 ten year liquidation or however long it's going to take --

21 THE COURT: Some might say they have emerged, and
22 some might say they have reorganized, and some might say
23 they're actually one of the largest financial enterprises on
24 the planet today.

25 MR. CANNING: Absolutely, absolutely. But

1 technically if they were a reorganized corporate debtor, and
2 if they had obtained money from the government under false
3 pretenses, false financials, and false misrepresentations,
4 that under 1141 of the Code, and 523 of the Code, they may
5 have been denied a discharge. And if that was the case
6 because we assert that they borrowed the \$1.2 billion with
7 false financials, direct false misrepresentations and that's
8 how they got the money.

9 Now, if that happened, and we were able to prove
10 that, if we were given an opportunity to prove that, that
11 they hindered or delayed, or defrauded the government
12 because they obtained money under false pretenses, and they
13 were a reorganized corporate debtor they might be denied a
14 discharge. In which event, we could go over to 6th Avenue
15 and give us \$1.2 billion, even though the unsecured
16 creditors only got 20 cents on the dollar.

17 So I understand that it's not under 507, but it's
18 not as if there's no circumstances under which a particular
19 type of creditor given particular facts can't ultimately get
20 a greater recovery than pro rata share of a pot of money.

21 THE COURT: But even in your examples, Mr.
22 Canning, you cite to principles of bankruptcy juris
23 prudence.

24 MR. CANNING: My point only there, Your Honor, is
25 a concept that if you defraud the government and get money,

1 the concept that Congress intends to have a scheme in place
2 to allow that money to be recovered is not so foreign, it's
3 not so alien. That is the intent of Congress. Now, I
4 understand --

5 THE COURT: Okay. But --

6 MR. CANNING: -- it's not as neat and clean as I
7 would like it to be.

8 THE COURT: Okay. But when you use words like
9 defraud the government in an argument about claim priority,
10 five years after the transaction in question without having
11 ever asserted with particularity the grounds on which you
12 might be able to establish such alleged fraud, you put a
13 bunny in the hat, and there's no hat, and there's no bunny.

14 MR. CANNING: Well, I -- look, I understand, Your
15 Honor. I mean, we could revisit a lot of the facts of the
16 last couple of years and discussions that we've had and
17 frankly, we are respectful of the claims process that's in
18 place. And as you know, under the Bankruptcy Code, that you
19 file a claim and it's the debtor that gets to object to that
20 claim.

21 And we are frankly, in many respects, glad that
22 we're finally here, and we're finally getting at it. There
23 -- the --

24 THE COURT: Well, the we're getting at it, you
25 recognize in the context of a motion that you're now arguing

1 to stay the proceedings --

2 MR. CANNING: I understand, Your Honor.

3 THE COURT: -- here so that you can move forward
4 in the district court on a motion to withdraw reference. So
5 while we're talking about all this, as if it's substantive,
6 it's not. It's purely procedural at the moment.

7 MR. CANNING: I understand. This would not have
8 been the way, and we were frankly surprised, particularly in
9 light of what I was referring to earlier about where we
10 thought we were in the process, that this is how it's come
11 to the table.

12 And indeed, Your Honor, and we touch upon this in
13 our papers, but at some level, we find this all pretty
14 troublesome because the plan, the confirmed plan, by its
15 language, Class 1 says, any creditor that's entitled to a --
16 that has a -- entitled to a priority under either 507 or
17 under 4617 of HERA will get paid a hundred cents on the
18 dollar.

19 There's no equivocation about that. It doesn't
20 say -- Your Honor, it doesn't say, in the event that a claim
21 under HERA is determined to be a priority under 507, that
22 the creditor will get a hundred cents on the dollar. What
23 it says in the confirmed plan is, if you have a claim either
24 under 507 or under HERA, you get a hundred percent recovery.

25 So we find it, you know, two years later out of

1 the blue, we get this motion to classify or reclassify, to
2 say, oh, well, you don't have a -- there is no priority.
3 They come in and say it doesn't exist, there is no priority.

4 Well, that's what the plan says. If we have that
5 claim, we get a hundred cents on the dollar. So again, I'm
6 not happy that we're here under these circumstances. We
7 thought we were trying to get at the merits, we thought we
8 were trying to get at finding out if there was any monies
9 borrowed with the intent to hinder, delay, or defraud, or
10 were there any transfers made that prevented our repayment,
11 in a manner that was intended to hinder, delay, or defraud
12 FHFA and Freddie Mac, but we haven't got there.

13 Now, we're in a position where they want to
14 release the reserve, and they want us to have a Class 3
15 claim which -- I mean, even that's puzzling to the extent
16 that they seem to acknowledge that in the worst of all
17 world, we have priority recoveries with respect to transfers
18 perhaps. And yet, all the transfers, they've either
19 recovered them or in the process of litigating with counter
20 parties to get that money.

21 And so then if they get that money we go back to
22 the plan, you look at Class 3 and Class 3 just says, we're
23 allocating pro rata all the proceeds among the holders of
24 allowed Class 3 claims.

25 So I mean, there's a lot of issues here that we

1 take exception with, Your Honor, but I --

2 THE COURT: Let me ask you a follow up question in
3 reference to the argument you just made about the treatment
4 in the plan that provides alternative treatment, either
5 under a 507 scheme or HERA.

6 MR. CANNING: Right.

7 THE COURT: Is there anything about the fact that
8 this treatment is provided in a plan confirmed in the
9 bankruptcy court, that is a relevant consideration to be
10 taken into account in determining mandatory withdrawal of
11 the reference? Because it seems to me that since we're
12 dealing with plan provisions --

13 MR. CANNING: Uh-huh.

14 THE COURT: -- the bankruptcy court is necessarily
15 the proper forum to decide questions of priority regardless
16 of which scheme is being applied.

17 MR. CANNING: I understand, Your Honor, and I
18 didn't really raise that in our motion.

19 THE COURT: I'm raising it now.

20 MR. CANNING: No, I understand, I understand. I
21 understand.

22 Well, I mean, to the extent that they have
23 expressed as the reason why the withdrawal won't occur,
24 despite the fact that 157(d) we think says it's mandatory
25 that it be withdrawn, is because they're convinced they're

1 going to win; that they don't really need to get into all of
2 this. That it's resolved in the bankruptcy to the extent
3 that they say under 507 it's not listed, so it's not a
4 priority.

5 Well, I guess it's relevant to me at least that to
6 the extent that if you're going to say well, there's no
7 issue here because it's resolved in the bankruptcy; well,
8 there is the plan out there, which if you actually go look
9 at the plan in the bankruptcy, the plan says no, there is a
10 priority.

11 And so if that's going to be decided, and you're
12 going to decide what are they applicable and respect of
13 rights, under the Bankruptcy Code and HERA may be informed
14 by the plan, that all of that goes to the fact that it's an
15 intersection between the Bankruptcy Code, the bankruptcy
16 process and HERA, a non-bankruptcy federal statute and the
17 Bankruptcy Code, and again, no strategic move here, but we
18 think that that requires a mandatory withdrawal.

19 THE COURT: I would suggest that that intersection
20 may suggest that it doesn't require a mandatory withdrawal,
21 but let's proceed with the other standards that you may wish
22 to put on the record with regard to your motion for stay,
23 because we've been focused on only one point.

24 MR. CANNING: Right, Your Honor.

25 Well, I guess the other point that LBHI makes with

1 respect to the other standards is, there's significant harm
2 to LBHI and the creditors, and there's no harm to FHFA.
3 And, you know, we just see that as entirely just the
4 opposite.

5 If the stay is not imposed, if the proceeding
6 proceeds and it's possible, it's certainly very possible
7 that some time before the ultimate determination of this
8 issue, because it is a -- I mean, it is a Nelsome (ph)
9 issue.

10 Before the ultimate determination of that issue,
11 if the consequence of this is that the \$1.2 billion is
12 released and it's made available to all creditors at this
13 point, and then down the road it is ultimately determined
14 that indeed FHFA and Freddie Mac do have a priority, and
15 they're entitled to a hundred percent recovery on that
16 priority, it's possible if there's then insufficient funds
17 left in the estate, that we would irreparably harmed.

18 And in some respects, it's not just, it's not just
19 Freddie Mac and FHFA. I suppose conceptually if they took
20 the \$1.2 billion and they distributed it all, and they wind
21 up in effect, over distributing to creditors, and there are
22 still, as we understand it, thousands of claimants that are
23 still out there to be resolved, and it's going to take a
24 long time to happen.

25 So there could be harm not only to FHFA and

1 Freddie Mac, to the extent that there were insufficient
2 funds in the absolute left, but there might also not be
3 sufficient funds to pay us in full because the plan still
4 says that ultimately if we have that priority claim we get
5 paid in full, then maybe there will be other creditors that
6 might be impacted a near term release of the funds as well.

7 And to the contrary, it's really difficult for me
8 to understand how there could be any harm to LBHI and other
9 creditors. I mean, again, and you pointed out, Your Honor,
10 we're five years into the case, four years since we filed a
11 proof of claim, two years since confirmation, and there's no
12 other distribution scheduled until March of next year.

13 So to have a short stay, while this issue can be
14 sorted in an orderly fashion, we think the harm versus
15 reward weighs in the favor of FHFA and Freddie Mac in that
16 regard.

17 I mean, the other items that are sometimes
18 relevant, Your Honor, I mean certainly we think that a stay
19 will also assist -- avoid inconsistent rulings maybe
20 unnecessary in avoidable appeals, resolve these ancillary
21 litigation expense when you're operating in two -- I'm
22 sorry, in --

23 THE COURT: Can I stop you on --

24 MR. CANNING: Sure.

25 THE COURT: -- just the reference to consistent

1 rulings?

2 Because the most logical way to obtain a
3 consistent ruling is for the bankruptcy court to decide
4 this, largely because the bankruptcy court has decided every
5 other claim issue in the case.

6 So one way to almost guarantee the potential for
7 an inconsistent ruling is to proceed with your stay, and if
8 you prevail, a motion for withdrawal of the reference with
9 the case ending up before a judge, who I expect will be
10 fully competent to deal with these issues, but will have
11 none of the context or history.

12 MR. CANNING: That's a fair observation, Your
13 Honor, I don't take strong exception with that.

14 Nevertheless, we think that, you know, on balance
15 when you look at all of the requirements that need to be met
16 in connection with the withdrawal of the reference and now
17 with respect to imposing a stay in that regard, we do think
18 that we have satisfied the criteria. We do think this is
19 mandatory to withdraw. We do think opposing the stay
20 imposes no harm at all on LBHI and the other creditors.

21 And potentially has significant harm, maybe
22 irreparable harm to FHFA and Freddie Mac, and we would ask
23 that the motion be granted.

24 THE COURT: All right.

25 MR. CANNING: Thank you.

1 THE COURT: Thank you very much, Mr. Canning.

2 MR. LEMAN: Your Honor, Mark Leman (ph) on behalf
3 of Freddie Mac, may I just add one other point?

4 THE COURT: I didn't realize we were double
5 teaming, but it's okay.

6 MR. LEMAN: Okay. Very briefly.

7 Your Honor, just with respect to the issue of
8 whether or not FHFA and Freddie Mac have a likelihood of
9 success on merits with regard to the withdrawal motion, we
10 think first of all that there's over 50 pages of briefs
11 submitted by the parties, all arguing over what the HERA
12 statute means. Clearly that's going to require a court to
13 interpret the HERA statute.

14 And there is a case right on point, demonstrating
15 that we have a high likelihood of success on the merits, and
16 that is the 2nd Circuit decision in the Colonial Realty case
17 versus Hirsch. And at page 128 -- the case is 980 F.2d 125.
18 At 128, note footnote 5, the 2nd Circuit noted when it was
19 construing the FIRREA FDIC statute which has virtually
20 identical language to the HERA statute, stated as follows.

21 "Although the issue is moot at this juncture, it
22 would appear that FDIC's motion should've been granted
23 pursuant to Section 157(d) in view of the FDIC's timing
24 motion and the asserted conflict between provisions of the
25 Bankruptcy Code and other federal statutes."

1 It then goes on to cite 157(d), and then says,
2 "This provision was not cited to the district court until
3 after it denied the withdrawal motion, and the bankruptcy
4 court had ruled in favor of the trustee on his motion."

5 And later on in the decision, at page 134 they
6 again once again refer to FDIC's remedies and said they
7 could've filed a withdrawal motion or could in the future,
8 and they refer back to footnote 5. Thank you, Your Honor.

9 THE COURT: Thanks for the footnote reference, but
10 this is not a situation of conflict between the Bankruptcy
11 Code and the HERA statute. This is simply a question of a
12 stipulation which includes alternative grounds for priority
13 in a plan that was confirmed.

14 So thanks for the reference, but I think it's
15 inapposite.

16 MR. LEMAN: Okay. Thank you, Your Honor.

17 MR. PEREZ: Thank you, Your Honor, good morning.
18 I'll be brief.

19 Your Honor, while I kind of hate to talk out of
20 school, but I think that the rendition of what happened and
21 why we didn't end up going to mediation just couldn't be
22 further from the truth. So if you'll indulge me for one
23 minute.

24 Ever since Mr. Canning came on board, it was
25 decided that this was one of the top priorities to try to

1 get resolved. We thought we were at the lip of the cup
2 trying to get a consensual resolution going to mediation,
3 when all of a sudden, not only was the rug pulled out from
4 under us when we thought we were going to mediation in
5 August or September, but they said December, but basically
6 said, we're not going to go to this until you resolve the
7 other claims that we have with our other people.

8 He spent countless hours doing this, so to the
9 extent that Mr. Canning gets up here and says it's not
10 tactical or strategic, that just could not be further from
11 the truth.

12 So having said that, Your Honor, let me focus on
13 the stay factors.

14 And, Your Honor, I think there are probably three
15 or four cases that are controlling that, in essence,
16 determine the stay. First of all, Your Honor, if you look
17 at the Court's Texaco case, which is a district court
18 opinion that adopts Judge Schwartzberg's opinion, it in
19 essence, it says, you know, when you have a threshold
20 bankruptcy issue, that's all you need to decide. And here,
21 I think you have a threshold bankruptcy issue, which is the
22 treatment under 507.

23 And Mr. Canning can argue what he can about what
24 the plan says. He can also argue about what the stipulation
25 pursuant to which that provision was inserted in the plan,

1 which clearly says, that we challenge the priority,
2 classification and everything. So it shouldn't come as any
3 surprise to him that there would be a motion to classify
4 this claim.

5 So, Your Honor, that's in essence the first point.
6 The second point, Your Honor, is that as it relates to
7 priorities, I think the Supreme Court could not have been
8 clearer, Congress could not have been clearer that
9 priorities, priority claims, not necessarily priorities, but
10 priority claims under the Bankruptcy Code are narrowly
11 construed.

12 And if you look at what Howard Delivery says, it
13 says, provisions allowing for preferences are tightly
14 construed, and then it goes on to quote Colliers, which says
15 priorities under the Code are narrowly construed.

16 So there's no issue here about what we're looking
17 at. If you're looking at a priority under 507 of the
18 Bankruptcy Code, those are narrowly construed.

19 So finally, I guess their argument is, is that
20 somehow the HERA either amended by implication, dealt by
21 implication, or did something by implication, not directly
22 because it's certainly not in 507, not directly. And again,
23 Your Honor, there is no basis, there's actually no basis to
24 conclude that.

25 We have the example of the change that was made to

1 FIRREA under the Crime Control Act. And the Colonial case,
2 which Mr. Lanman (ph) cited, which I think frankly is our --
3 is the strongest case for us on this issue, basically says
4 that you can't have this implicit withdrawal.

5 There, they were dealing with whether FIRREA
6 somehow implicitly amended 362, which I think is a much
7 closer question because you don't have the overlay of 507
8 and Supreme Court juris prudence that says you narrowly
9 construe it.

10 So what you have is, you know, the -- Colonial
11 basically says, in the absence of an affirmative showing of
12 an intention to repeal, you can't change it. And then they
13 go through and at page 132 and 133 it says, basically, you
14 know, Congress is presumed to legislate with knowledge of
15 former statutes, and will expressly designate provisions
16 whose application it wishes to suspend, rather than leave
17 the consequences and uncertainties of implications
18 compounded by the vagaries of the judicial system.

19 And then it goes on to show which sections were
20 amended pursuant to the Crime Control Act to change the
21 priority scheme, including adding 365(o) and 507(a)(9), and
22 basically says, given this careful attention to harmonizing
23 with the Bankruptcy Codes, it becomes especially implausible
24 to conclude that they did it in essence sub salento.

25 So, Your Honor, again, we have the example of this

1 similar statute under FIRREA. There's no question that if
2 had Congress intended to change the priority section of the
3 Bankruptcy Code, it could have done so because, in fact, it
4 did under FIRREA.

5 And finally, Your Honor, the issues that are
6 raised in their proof of claim and in our motion are
7 precisely the issues that this Court deals with all the
8 time. And, in fact, the John versus FDIC case, the district
9 court there basically says that the comparison to the
10 similar section in FIRREA is identical to the comparison of
11 548 and 550 under the Bankruptcy Code. So it's something
12 that this Court has absolute knowledge of.

13 THE COURT: I accept that. I understand this
14 stuff. Let's just accept the fact that I've been doing this
15 for five years in Lehman, and longer in other cases,
16 including Mr. Canning's case Quebecor, where we had, and
17 continue to have a vast claims reconciliation process that
18 is ongoing.

19 That's not the issue. The issue is whether or not
20 withdrawal of the reference is mandatory because this Court
21 or the district court needs to construe an applicable non-
22 bankruptcy federal law in order to determine the resolution
23 of the dispute.

24 And the real issue that I think we need to
25 confront today, notwithstanding my colloquy with Mr. Canning

1 that led up to this, because I do believe that this is a
2 bankruptcy issue.

3 MR. PEREZ: Absolutely, Your Honor.

4 THE COURT: I do believe that there's a question
5 of plan interpretation, and I do believe that the non-
6 bankruptcy federal law in question is uniquely analogous to
7 Bankruptcy Code provisions that I am familiar with, so that
8 to the extent there is a policy reason underlying mandatory
9 withdrawal of the reference, that policy reason would not be
10 implicated here.

11 But the long question doesn't talk about the
12 policy. And so we have to interpret the words, to what
13 extent is withdrawal of the reference mandatory simply
14 because in order to resolve this, people are going to be
15 talking about the HERA statute, and I'm going to be asked to
16 make some judgments as to how it applies to this situation.

17 MR. PEREZ: Your Honor, I don't think it is
18 mandatory. And I think that the Texaco case basically says
19 it's not mandatory; because in that circumstance, you look
20 first to the Bankruptcy Code, and it's really an
21 interpretation of 507 of the bankruptcy court. And we're
22 not asking the Court to determine what priority may exist
23 under HERA. What we're really asking the Court to
24 determine, is there a Bankruptcy Code priority.

25 So we don't believe that under the Texaco case,

1 that there is a mandatory withdrawal to the reference
2 necessary.

3 THE COURT: Let me ask you a little bit about Mr.
4 Canning's expressed concern that if the \$1.2 billion
5 currently set aside to secure this claim is released, that
6 there is some potential risk to FHFA, and potentially other
7 creditors as well associated with the loss of that reserve,
8 and presumably the distribution of those funds to creditors
9 holding allowed claims.

10 MR. PEREZ: Your Honor, I think the concern in our
11 mind is illusory. We've had four distributions. We have
12 ongoing -- the Court is fully aware of the nature of the
13 claims process in this case. It's going to take a while.

14 We have bi-yearly distributions, every six months
15 we have distributions. The Board determines exactly how
16 much it things it can distribute or not distribute. So
17 that's number one. So I don't think that that is a real
18 issue whatsoever.

19 Second, Your Honor, and as we've said in our
20 papers, and frankly the Court is aware of the RESCAP
21 situation, and if you look at FHFA's papers in RESCAP, what
22 they're basically saying is, they have a priority to be able
23 to go out after some of those cases. And the John case
24 clearly says, that normally the FHFA has to assert their
25 claims against third parties for these recoveries.

1 So that's not -- I don't think that's in dispute.
2 So to the extent that they have those rights, I don't think
3 anything that we say or do in our papers is going to take
4 those rights away from them.

5 THE COURT: Okay. Now, I have a question for you
6 about timing. We have a dust up here, which is one of the
7 plan administrator's own creation, in a sense, because the
8 scheduling of claims matters tends to be within the plan
9 administrator's discretion, or the scheduling needs of
10 parties that have objected and they need some more time to
11 talk about a possible resolution by consent or some of these
12 matters are complicated and may go to mediation such as this
13 one might have. But this one didn't go to mediation. And
14 the plan administrator pulled the trigger, suggesting to a
15 casual observer like me that this is also tactical. I'm a
16 little concerned about that, and I'd like you to address it.

17 MR. PEREZ: Absolutely, Your Honor. I mean,
18 certainly the Court can have that view. At some point, Your
19 Honor, the plan administrator has to determine whether it
20 thinks that continued negotiations are appropriate and
21 should go forward, or whether at some point you really need
22 to start the process.

23 And, Your Honor, we're not here lightly. I mean,
24 we spent a year and a half trying to do that, to the point
25 where there was just no -- in our mind, there's just no

1 coming back. There's just no light at the end of that
2 tunnel.

3 So to deal with what I view as a fairly narrow
4 legal issue, we filed another motion, again a fairly narrow
5 legal issue that's set for hearing next month. I don't
6 believe that that's in the least bit tactical, but the plan
7 administrator has to have some leeway to determine that
8 negotiations have gone on long enough, and at this point,
9 they're being counter-productive, and what we really need to
10 do is move on to the next state reluctantly.

11 So if the Court considers that to be tactical, I
12 don't think that the plan administrator would be discharging
13 its obligations if it didn't make that determination.

14 THE COURT: I'm not suggesting that the word
15 tactical is a dirty word either. I'm simply identifying the
16 fact that few things happen in this courtroom by accident
17 unless I've done it myself.

18 So with that said, do you have any more to say on
19 the question of the stay?

20 MR. PEREZ: Well, no, Your Honor. I -- number
21 one, I don't think that they're likely to succeed on the
22 merits, and with respect to the harm, I just don't think
23 that they're really going to suffer any harm. And by the
24 same token, this is a pot of cash that would be otherwise
25 available. Most of it is going to go to them by the way,

1 because they're going to get their catch-up distributions as
2 a Class 3 creditor. Thank you, Your Honor.

3 THE COURT: Okay. Anything more, Mr. Canning?

4 MR. CANNING: No, I think on the stay, Your Honor,
5 I think that's all.

6 THE COURT: All right. This is an interesting and
7 difficult question, and when this was first presented to my
8 attention within the last week or so, my immediate reaction
9 was well, isn't this unusual. This is the first example, at
10 least in my experience of a motion to stay being brought in
11 the context of an ordinary course claim objection, in order
12 to allow the claimant, in this case FHFA and Freddie Mac to
13 proceed with a mandatory motion to withdraw reference in the
14 district court. It's certainly one of a kind in my
15 experience, and maybe in the experience of everybody else in
16 the room.

17 And so the immediate reaction you have to
18 something like this is, to ask yourself, well, why is this
19 happening. And what's the obligation of the Court to deal
20 with the motion.

21 This has been an illuminating argument, and I
22 appreciate the contributions of counsel, both in terms of
23 the briefing and oral argument. But in the end, the
24 question before the Court comes down to the fundamentals of
25 whether or not a stay is appropriate, and the stay standards

1 are the very same standards that Court routinely apply in
2 deciding whether or not to grant a stay, for example, of a
3 confirmation order pending appeal. It's the very same set
4 of four familiar standards.

5 To me, the most important standard is the
6 likelihood of success on the merits of the pending motion to
7 withdraw reference. And we spent a lot of time discussing
8 that. I view this as not a black and white question, but a
9 nuanced one.

10 I see it as a gray area in which it is not at all
11 clear that withdrawal of the reference is mandatory
12 notwithstanding the fact that I am being asked directly or
13 indirectly to consider both Bankruptcy Code priority
14 principles and principles of priority under an applicable
15 non-bankruptcy federal statute, the HERA statute.

16 I think I've been fairly transparent during the
17 colloquy that we've had, as to my views, but I'll restate
18 them briefly now.

19 I consider the claims process in the Lehman
20 bankruptcy cases to be somewhat unique, in that they have
21 been pending now for a number of years with a regular
22 omnibus hearings scheduled in this courtroom on a monthly
23 basis. We have had more claims resolved in this case than I
24 think have ever been resolved in any other case.

25 At the commencement of the bankruptcy case, when a

1 bar date was set, no one really knew what the claims side of
2 the ledger would look like. This is an approximation, but
3 something in the neighborhood of \$1.3 trillion of claims
4 were filed.

5 The plan that was confirmed in December of 2011,
6 happens to be one of the most remarkable bankruptcy results
7 that I think has ever been achieved in any insolvency case
8 anywhere. That result was possible in part because of the
9 ability to both reconcile claims that were in dispute, but
10 also to come up with a set of procedures that were
11 regularized, systematic and also transparent to deal with
12 the ongoing resolution, and sometimes disallowance of
13 claims.

14 I think that this fact pattern coupled with the
15 fact that at confirmation, FHFA was an objector, whose
16 objection was resolved by means of a stipulation, which
17 stipulation provided for reserved rights on the parts of the
18 debtor to object to the classification of the claim, takes
19 this dispute out of the category of mandatory withdrawal of
20 the reference.

21 Not only is that true because of the case history
22 that I am roughly reciting, but it is also true because the
23 provisions of the HERA statute are not arcane or unusual
24 from the perspective of a bankruptcy tribunal. Whether
25 we're dealing with an application of HERA or dealing with

1 priorities under Section 507 of the Bankruptcy Code, we are
2 dealing with claim priority questions, and in the case of
3 the HERA statute itself, we're dealing with priorities
4 associated with avoidance powers.

5 In that sense, the non-bankruptcy federal law in
6 question is very closely analogous to bankruptcy law. I
7 believe for that reason, that this is one of those
8 circumstances where mandatory withdrawal of the reference
9 makes no sense.

10 I am not deciding that question, however. I am
11 simply concluding that I believe it more likely than not,
12 that a district court considering the pending motion to
13 withdraw the reference will conclude that under the
14 circumstances of the Lehman bankruptcy case in particular,
15 the bankruptcy tribunal is the most logical place for claims
16 to be resolved, even claims that involve the potential
17 application of the HERA statute.

18 Accordingly, I conclude that the motion for stay,
19 while prosecuted in good faith, and the motion to withdraw
20 reference, while being prosecuted in good faith, both are
21 lacking in merit.

22 For that reason, I deny the motion for stay, and I
23 do not intend any of my comments to influence the district
24 court one way or the other in considering the motion to
25 withdraw reference.

1 I'll make one last comment. I incorporate by
2 reference the point that I made to counsel for Freddie Mac
3 with regard to footnote 5. I believe footnote 5 is
4 inapplicable.

5 Now what?

6 MR. PEREZ: Well, Your Honor, the next motion
7 would be the motion to classify, which is my motion. I
8 don't know if you want to take the other matter and then
9 come back to this, or do you want to go forward with this?
10 I'm happy to argue because we've already argued it already.

11 THE COURT: Well, there has been a substantive
12 argument cloaked in a motion to stay, but one of the
13 problems with what happens next, and we have a scheduling
14 problem here, I know that there are parties who are
15 participating in this hearing through court call. There
16 were a number of parties who understood there was an 11
17 o'clock calendar and may have dialed in for that calendar.
18 I'm not sure if they're on the line or not. There are any
19 number of people who have filed into the courtroom while we
20 have been dealing with the current argument. Their
21 appearances will need to be entered before we start that.

22 And so just a question I have for counsel, I'm not
23 sure which matter is longer, but it appears to me that there
24 are more lawyers involved in the other one. And so my sense
25 of judicial economy, to the extent it relates to the hourly

1 rates of the lawyers who are involved, may be to take a ten
2 minute break, allow there to be a shifting of seats, so that
3 people who are taking the lead in the 11 o'clock calendar
4 can take those seats.

5 Those parties who intend to have speaking roles in
6 that argument can enter their appearance with the ECRO
7 reporter, and we can then start with the 11 o'clock calendar
8 at say 11:30.

9 And with respect to those who have been arguing
10 the motion for stay, I'll simply ask that you wait until we
11 conclude the 11 o'clock calendar, and I'm sure you'll find
12 it very interesting.

13 MR. PEREZ: Thank you, Your Honor.

14 THE COURT: We'll take a short adjournment till
15 11:30.

16 (Recessed at 11:17 a.m.; reconvened at 11:32 a.m.)

17 THE COURT: Be seated. Let's proceed.

18 There are some parties who are appearing
19 telephonically, and just so I can understand what to expect
20 as we proceed, I'd like to know if there's anybody who is
21 appearing by telephone that anticipates saying anything, as
22 opposed to just listening in.

23 (No response)

24 THE COURT: I conclude from the silence, that the
25 only speakers will be in the courtroom. Please proceed.

1 MR. PASQUALE: Good morning, Your Honor, Ken
2 Pasquale from Stroock and Stroock and Lavan for one of the
3 movant, CarVal Investors LLC.

4 Your Honor, I want to kind of take a step back
5 from the various papers you've read and kind of just put
6 this in context. There's a lot of discussion, especially in
7 the plan administrator's papers about fiduciary duties and
8 claims and all of that. This a Rule 2004 examination.

9 We're here requesting information. The reason we
10 are in this position of being before the Court is the debtor
11 signed a commitment letter, in which we are told, they are
12 bound by a non-disclosure arrangement. This Court can order
13 disclosure under Rule 2004.

14 THE COURT: Why would I do at this time in this
15 proceeding, given what I've read and what you've read too?

16 MR. PASQUALE: Well, Your Honor, first of all, the
17 Court has the authority to do it, and we've cited cases
18 that --

19 THE COURT: I have all kinds of authority, but I
20 also have the discretion not to exercise it.

21 MR. PASQUALE: Yes, of course, you do, Your Honor.
22 Why would you do it here? There is a -- again, let's take a
23 step back. The claims at issue being held by LBHI2 in which
24 LBHI is the primary creditor, primary beneficiary to the
25 tune of about 87 percent of recoveries to LBHI2 are worth

1 face value, 1.25 billion pounds, plus interest, which would
2 take that number up to about 1.8 billion pounds.

3 The transaction that is proposed, Exhibit B to our
4 motion is the press release, which is the only information
5 available, provides for a \$650 million cash payment, right
6 to receive future contingent sums, and a share in certain
7 claims. That's all we know.

8 THE COURT: Okay. Let's assume for the sake of
9 discussion that we have a black box. We don't know what's
10 inside of it exactly, but we have prudent managers of the
11 reorganized debtor's affairs who have asserted that they
12 have the discretion and the business judgment to do what is
13 best for the estate. And they say not only trust us, but
14 we're doing everything we can to maximize value, this is a
15 value maximizing transaction, and the parties who are
16 seeking 2004 discovery are wrongfully abusing process in
17 order to gain access to information to which they have no
18 right with respect to a proceeding that is complicated and
19 in litigation in the high court in London.

20 Let's just assume all that's true. And if you
21 assume that's true, why would I ever grant you relief?

22 MR. PASQUALE: Perhaps if those were -- if that
23 was the situation, Your Honor, you might not, but that's not
24 the situation.

25 THE COURT: Why is it not the situation? Because

1 I have concluded based upon what I've reviewed that this is
2 the situation. So I'm letting you and others aligned with
3 you know right now that to the extent that this is a
4 tentative ruling, you have lost.

5 MR. PASQUALE: I appreciate that up front, Your
6 Honor, so let me try to convince the Court otherwise.

7 The requests that are being made here in this
8 court are solely to the plan administrator. None of the
9 requests, if you read them, have anything to do with the UK
10 proceeding.

11 My client carve out holds \$12 billion of claims
12 against LBHI. Whatever else is going on in the UK, has
13 nothing to do with the claim recovery in this case.

14 THE COURT: Understood, but let's just understand
15 something else. This is not a plan that has an important
16 hedge fund creditor's advisory committee as part of its
17 governing structure. And so the plan doesn't provide that
18 you have any right to know or interfere, and one of my
19 conclusions is that this process that you have undertaken
20 that others have joined in, and I understand that there are
21 a lot of very significant financial players in the case that
22 have interests aligned with you, so I recognize this is an
23 important issue.

24 But from my perspective, it looks very much like
25 an attempt to either second guess the decision or to take

1 away an opportunity for your economic benefit, because you'd
2 like to overbid.

3 MR. PASQUALE: Well, at this point, Your Honor, we
4 don't know what we're second guessing. The debtors have put
5 in papers, no sworn testimony, nothing. So we're really at
6 a loss to say what the transaction is, what's actually
7 happened; again, that's the basis for the request.

8 THE COURT: I understand your curiosity, but it
9 leads me to say so what.

10 MR. PASQUALE: The two --

11 THE COURT: There are all kinds of people who
12 don't know about this transaction, and based upon what has
13 been represented to me, you don't really have a need to know
14 until later when presumably there will be an opportunity for
15 more fulsome disclosure.

16 But you also have no particular right to
17 disclosure except pursuant to 2004, and it is the debtors'
18 position, now the plain administrator's position that 2004
19 is inapplicable when a debtor such as this is no longer a
20 ward of the court.

21 MR. PASQUALE: Well, I want to go -- if I may,
22 Your Honor, go back to the Court's prior statement and come
23 back to that. You mentioned using the information for
24 purposes of increasing an offer. Certainly true that CarVal
25 has put in an offer, in fact, more than one, one -- with

1 other creditors one by itself for 900 million pounds. But
2 as we've set forth in our papers, CarVal was willing to step
3 back from that, and said, not be involved in that bidding
4 process at all, as long as there is a process.

5 So I think the imputing of that motivation is
6 misplaced, and that is not my client's intent. My client's
7 intent, in bringing this application and trying to get the
8 information, is to ensure that the recoveries for creditors
9 of LBHI here are maximized.

10 THE COURT: Don't you assume right now, as I do,
11 that the board of directors and managers of reorganized LBHI
12 are committed to getting the most they can out of the assets
13 that they have to manage, and don't you agree with me,
14 because I think this is true, that up to this point, they
15 have done an admirable job. And don't you agree with me
16 that ultimately you have no say in this question at this
17 point because you are simply an economic player that is
18 interested, but you really have no role.

19 MR. PASQUALE: I certainly have no criticism of
20 what's transpired to date, and in fact, that is one of the
21 reasons this situation is so strange.

22 Why -- with the information available, the other
23 offers that were made, the LBIE status report which
24 indicates information as to the increased value on the LBIE
25 estate, why would this deal be entered into. I think it

1 raises, as we've called it in our motion, these significant
2 questions, significant red flags.

3 THE COURT: I know about the red flags, inquiring
4 minds want to know, but so what. We have a fully
5 reorganized debtor that is operating without bankruptcy
6 court oversight of the transactions that it enters into,
7 pursuant to a plan that was confirmed I gather with your
8 client's support, because it was overwhelmingly supported by
9 major creditor interests. And what reason do you have to
10 question that this transaction is, in fact, a value
11 maximizing transaction in the best interests of all
12 creditors?

13 MR. PASQUALE: Well, I don't believe, Your Honor,
14 that the plan does preclude creditors from seeking the
15 Court's intervention in matters. This Court retained
16 jurisdiction.

17 THE COURT: That wasn't my question. My question
18 was --

19 MR. PASQUALE: Sorry, I thought was answering.

20 THE COURT: -- what reason do you have to question
21 that this transaction is a value maximizing transaction?

22 MR. PASQUALE: Oh, Your Honor --

23 THE COURT: I didn't ask you whether or not you
24 had the right to do what you're doing. I concede you have
25 the right to do what you're doing.

1 MR. PASQUALE: Thank you, Your Honor. The reason
2 is as we've expressed in our papers. We do not have
3 information as to the terms. We do not have information as
4 to the value. We have indications of value far and above
5 what appears to be the terms of the proposed transaction, as
6 set forth in the press release.

7 We have the LBIE joint administrator's report,
8 issued just 11 days after this commitment letter was signed
9 by LBHI. These are significant indications that something
10 is fishy with respect to this transaction. We simply don't
11 know what that is, Your Honor.

12 And I do think the fact that, yes, LBHI as a plan
13 administrator, its post confirmation, but there are rights
14 as I said a moment ago, that creditors have. This is not,
15 as much as LBHI would like to say so, like a company that
16 was never in bankruptcy. The situation is different.

17 This Court has retained jurisdiction over certain
18 aspects, and this frankly is one of those aspects, where the
19 issue pertains to distributions, maximizing distributions,
20 excuse me, to creditors of LBHI.

21 So we think it's very important that there be
22 transparency as to the information in this deal. What are
23 we going to do with that information when we get it? First,
24 Your Honor, as we've said in our papers, and I think all the
25 other creditors here, they can speak for themselves, but I'm

1 sure they would agree, there's no issue of maintaining
2 confidentiality. We will enter a confidentiality agreement.

3 But by having the information, we then can
4 evaluate a) the terms; b) the value; and c) -- letter C, we
5 will be able to see these other aspects that don't have a
6 number value on them. Again, the debtor says -- excuse me,
7 LBHI has spoken about them in their papers, but they haven't
8 disclosed anything as to what the value of the sharing in
9 claims is, or these possible contingent recoveries. We
10 don't know that, Your Honor.

11 And how can a creditor put a check on the plan
12 administrator, which we are entitled to do under the terms
13 of the plan, without having disclosure of a very significant
14 transaction. Again, this is probably -- if it's not the
15 largest, it's certainly one of the largest assets remaining
16 of this matter, the LBHI estate.

17 So I hope that answered Your Honor's question.

18 THE COURT: It does, but I have some very serious
19 concerns as to the appropriateness of a 2004 process to
20 interdict business decisions that are being made, I presume,
21 in the utmost of good faith by the stewards of the asset
22 base, and I have real questions as to whether, from a
23 process perspective, it is good precedent and good practice
24 for large and influential investment funds, such as the
25 group you represent, to run into court whenever they see

1 something that they want to know more about, both because
2 they are interested in their capacity as a creditor, and
3 also interested opportunistically as a potential investor.

4 MR. PASQUALE: Well, this Court certainly has the
5 authority and discretion to handle those matters, if and
6 when they would come up.

7 Again, this particular matter, this isn't a
8 regular event. It has not been. This is again, a huge
9 transaction.

10 THE COURT: Well, I know it's a huge transaction,
11 but it's also a transaction in which your client is not just
12 interested in its capacity as a creditor, but at least
13 originally was interested in its capacity as a potential
14 purchaser of the very same assets. Correct?

15 MR. PASQUALE: As a result --

16 THE COURT: That's a yes or no.

17 MR. PASQUALE: No, it's correct, Your Honor.

18 THE COURT: Okay.

19 MR. PASQUALE: And it's as a result of the
20 information that was disclosed in the press release, and
21 seeing what appears on the face to be far less value than we
22 believe should be attributed to the assets, to the claims.

23 Let me go back to one of Your Honor's prior
24 questions, I believe. We have the benefit of being here in
25 bankruptcy court that we don't have to shoot first and ask

1 questions later. If LBHI had never been in bankruptcy, and
2 this were a business judgment question as a corporation
3 operating outside of, you know, any bankruptcy involvement
4 whatsoever, I think our remedy would have to be, are there
5 claims, can we bring a TRO to stop this transaction, seek a
6 preliminary injunction, basically shoot first and ask the
7 questions later.

8 Here, because of -- because we are here in
9 bankruptcy court, because we have the opportunity to seek
10 the Court's order with respect to Rule 2004, we can ask the
11 questions first, and try to attain the information. And if
12 everything LBHI is telling us is true, there is nothing
13 else. But if there are questions remaining after that
14 information is available to us, we then get to decide
15 whether there are appropriate claims to bring in this court.
16 Whether this is a basis for an injunction.

17 We have that benefit here that doesn't exist
18 elsewhere, Your Honor.

19 THE COURT: Okay. Well, it raises, at least to my
20 mind, and interesting question of transparency. One of the
21 guiding principles of the Chapter 11 cases up to the point
22 of the plan going effective in early 2012, was that there
23 was a remarkably high degree of information sharing,
24 including discovery protocols that were put in place,
25 leading up to the plan process that resulted in the

1 compromised plan that was ultimately confirmed.

2 And in my mind, I draw a distinction between the
3 transparency that is a necessary attribute of case
4 administration for a company before the effective date of
5 its plan, and the desire for information which is what
6 underlies the 2004 requests today.

7 And it seems to me that there is a fair
8 distinction to be drawn. You're not entitled to know
9 everything, and I see no reason why I should be receptive to
10 your request, other than the fact that this is a
11 particularly conspicuous transaction that major players in
12 the case, including CarVal and Baupost and Paulson have
13 expressed an interest in, and were another major player in
14 the case, Elliot, King Street already inside the tent.

15 So that from the perspective of the Court, this
16 takes on a character of an almost intramural battle of
17 investment funds with regard to a transaction that may or
18 may not be a prized transaction, that carries with it some
19 policy overtones, as to what the proper role really is, if
20 any, of individual claimholders regardless of their size
21 post effective date. And whether it is a proper use of the
22 Rule 2004 procedure to come to court, in this instance, and
23 perhaps others that may arise, to intervene and maybe
24 interfere in the administration of the post reorganization
25 estate assets.

1 So I think it's a very important set of questions.
2 For me the question at hand is, have you shown sufficient
3 cause under the circumstances to do something that I view is
4 extraordinary, and maybe even unprecedented.

5 MR. PASQUALE: Well, if I may, Your Honor, I --
6 we've cited cases, so I don't think it's unprecedented
7 for --

8 THE COURT: Well, there are plenty of cases that
9 involve Rule 2004.

10 MR. PASQUALE: Post confirmation.

11 THE COURT: I don't think there are any cases that
12 involve an attempt to investigate by indirect means a
13 transaction that is occurring if it occurs pursuant to the
14 law of Inland and Wales with reference to two separate
15 proceedings in administration in the UK where the true
16 information in question doesn't involve US based assets, but
17 foreign assets, I would suggest this is a one-off situation.

18 MR. PASQUALE: Well, ultimately I think, Your
19 Honor, if I may, the issue does involve claims in this court
20 against LBHI. Again --

21 THE COURT: I know they're derivative. I mean,
22 you don't -- you actually don't have to explain that, and I
23 understand it.

24 MR. PASQUALE: So I'm just trying --

25 THE COURT: But the --

1 MR. PASQUALE: I'm sorry, Your Honor.

2 THE COURT: But that's an end run around what's
3 really going on, which is an attempt to understand what's
4 happening in the UK, because that's where the value is.

5 MR. PASQUALE: My client can take whatever action
6 is appropriate in the UK, has done so already. Again,
7 that's not why we're here today. It is not about the UK.
8 It's about this proceeding, Your Honor, and remember LBHI is
9 a party to this commitment letter. It's not standing
10 outside the transaction. It is part of the transaction.

11 So I do think there is a very close tie to this
12 court, separate and apart having nothing to do with what's
13 going on in the UK.

14 THE COURT: That's true, but the information that
15 you seek relates to the transaction that is to be affected
16 with respect to the UK administration proceedings.

17 MR. PASQUALE: Certainly the LBIE and LBHI2 are
18 involved in that, but as is LBHI in this court. So, yes,
19 it's intertwined. Those parties are intertwined. It is a
20 transaction involving all of those, absolutely.

21 I'd like to make -- if I can, Your Honor --

22 THE COURT: So why is this an appropriate use of
23 Rule 2004?

24 MR. PASQUALE: Well, again, as Your Honor knows,
25 there hasn't been any disclosure. In order for my client

1 and the other creditors in this room to consider whether
2 there are any appropriate actions to be taken, that
3 information is necessary. And I use the vernacular earlier,
4 you know, of being able to not have to shoot first and ask
5 questions later. I think that's a very important
6 consideration. Without it, the creditors standing on this
7 side of the courtroom will have to consider what do we do.
8 Do we have to bring some kind of litigation without knowing
9 the details.

10 It may very well be, and I think we have to ask
11 ourselves, why the secrecy here. Because it's not been the
12 course before, Your Honor. Your Honor, you're absolutely
13 right in noting that. But it is here. And why is that?

14 So we may see the information as I said a moment
15 ago, and say, okay, now we understand it. But that is not
16 the case right now. And as we see it right now, there are
17 significant issues with respect to the value or what appears
18 to be far lower value than should be.

19 Let me, if I may, Your Honor, just make one last
20 point, and I'll see if my colleagues want to try to answer
21 Your Honor's questions as well.

22 LBHI with respect to its objections says, okay, we
23 need to balance the interest here, and I've spent time
24 answering Your Honor's questions as to what our interest is.
25 What's not said in LBHI's papers is, what happens if they do

1 disclose the information. We know they have a contractual
2 obligation not to, that's what we've been told. They've not
3 told us that Elliot and King Street will walk away from this
4 transaction if the information is disclosed.

5 And frankly even if they did, my client and the
6 other creditors here have before, and I'm sure will again,
7 be willing to step into that void.

8 The only other prejudice that LBHI's side is with
9 respect to commercial information, and again, a
10 confidentiality agreement takes care of that issue. So I
11 think when we look at the balancing of interests here, that
12 weighs in our favor, in favor of granting the application
13 and disclosing the information. By doing so, it answers all
14 these questions, Your Honor.

15 It's answers the question of value, it answers the
16 question of process, it answers the question of the terms of
17 the transaction, and frankly, it puts an end to why we're
18 all here today.

19 THE COURT: It answers all those questions
20 perhaps, but you assume something which is that you have an
21 entitlement to know the answers to those questions, and that
22 it's appropriate for you to invoke Rule 2004 as a procedural
23 device to in effect invade the province of case management
24 that belongs to the plan administrator.

25 MR. PASQUALE: But -- sorry, Your Honor.

1 THE COURT: That's the policy question here that
2 overrides this debate.

3 MR. PASQUALE: And I, on a couple of occasions,
4 tried to answer that for the Court by citing to some of the
5 case law, and Your Honor has noted that some of the
6 differences here. But the fact here, like those cases, is
7 the Court has retained jurisdiction, and the 2004
8 examination that we're seeking, and I'm going to quote from
9 the Express One case if I may,

10 "Is a legitimate post confirmation inquiry to
11 determine whether Express One," in that case, "is acting in
12 conformity with the purpose of the plan."

13 It's exactly the situation we have here, Your
14 Honor. We are entitled, I believe, under the case law, and
15 for the reasons we've been discussing to 2004 examinations
16 to confirm, to ask those questions in this situation is LBHI
17 conforming with the provision of the plan, which is to
18 maximize distributions to creditors of this -- these estates
19 here, Your Honor.

20 THE COURT: I'll disagree with your use of the
21 word entitled. The case law does not give you any
22 entitlement. The case law --

23 MR. PASQUALE: Court's discretionary in the court.

24 THE COURT: -- provides certain analogous
25 precedent that may or may not be applicable, and your

1 entitlement, if any, is solely within my discretion to
2 grant.

3 MR. PASQUALE: Absolutely, Your Honor, I didn't
4 mean --

5 THE COURT: Okay.

6 MR. PASQUALE: -- to speak otherwise. Thank you.

7 THE COURT: Thank you.

8 MR. BANE: Good morning, Your Honor, Mark Bane,
9 Ropes & Gray on behalf of the Baupost Group.

10 I appreciate Your Honor giving us a road map as to
11 the Court's concerns, and I'd like to summarize as I
12 understand three overall categories that the Court has put
13 on the table to be responded to.

14 Number one is, aren't the movants and the joinders
15 tainted, aren't they tainted either by virtue of the fact
16 that they're really just disgruntled counter bidders that
17 are being precluded from making money on an opportunity, or
18 perhaps maybe they're tainted because really they're LBIE
19 creditors, who are looking as the debtors suggest, to take a
20 bigger role in the LBIE case, and therefore, are using their
21 small interest in LBHI to exploit what is a much greater
22 opportunity at LBIE.

23 I'd like to address that. Number two, as I
24 understand the Court is very concerned that what right do
25 you have to this information to begin with; the plan was

1 negotiated heavily, the creditors were very informed in
2 those negotiations, in fact, the movants and the joinders
3 who are here today were involved in those negotiations, and
4 we negotiated away the rights to review. And therefore,
5 what are you doing here, the plan doesn't provide for this
6 opportunity. In fact, you've negotiated it away.

7 I'd like to address that as well.

8 And finally you raise the very legitimate
9 question. Until now, there has never been a reason to
10 suspect the LBI management, administrator was doing anything
11 other than trying to maximize value. The administrator and
12 his counsel are telling the Court that it would like to
13 retain this confidentiality, what right does the Court to
14 have to second-guess a very legitimate and trustworthy and
15 integrity based board of directors and administrators, and
16 I'd like to address that as well.

17 The first topic is the taint. And Your Honor
18 would be perhaps correct if the only movants were movants
19 who were looking to bid. We have a large group of movants
20 and joinders. Some put in bids, some did not. Some are
21 purely here because they're worried about recoveries as
22 creditors, and frankly I believe, Your Honor, that my
23 client, as well as CarVal, as well as all the others who did
24 put in an interest to bid, are not here because they want to
25 bid. Are actually here because they believe that the LBI --

1 the LBHI estate is deprived of true value. That's the
2 intent. That's the reason they're here, and that's, as Mr.
3 Pasquale noted, CarVal is prepared to withdraw its bid and
4 say it will not bid. Which I don't think is a ploy, because
5 if it was really the only motivation, what would they get
6 out of that ploy. The answer is, because everyone on our
7 side of the table is convinced that there's enormous value
8 being deprived to the LBHI creditors.

9 And number two is, there's a suggestion well, as
10 LBHI mentioned in their objection that, we're all tainted
11 because we're really here for our LBIE claims.

12 As CarVal put into their papers and as I'm
13 prepared to represent, we may have LBIE claims, we have much
14 great LBHI claims. And not only do we have much greater
15 LBHI claims, but the magnitude of discovery, the scope of
16 recovery is far, far greater not only in dollar amount in
17 claims, but in dollar availability, GAAP in LBHI, and
18 moreover, as I said with regard to bidding, there are
19 members of our group, movants or joinders, who don't have
20 significant LBIE claims.

21 Why would they be interested in joining this group
22 in seeking this recovery if it's detrimental to LBHI, if
23 they don't have LBIE claims, and the only reason we're doing
24 it is to benefit LBIE. The answer is because that's not the
25 motivation.

1 The motivation is, and I beg Your Honor to take us
2 at our word, our motivation is we believe that there is a
3 mistake being made, a transaction is being pursued that is
4 going to deprive the LBIE creditors of true value.

5 Next, Your Honor, say, well, that may be true, but
6 who are you to show up here, and expect the Court to give us
7 an opportunity to see the answers. You negotiated away that
8 right under the plan. And Your Honor is correct, and the
9 debtor LBHI has conceded that this was a very, very complex
10 plan, heavily negotiated, with the involvement of the very
11 parties who are seeking the relief today.

12 But not only was there a provision deleted that
13 said, okay, you don't have a right to notice and hearing on
14 every motion as you would in a Chapter 11 case.

15 There was also another provision that was heavily
16 negotiated. If Your Honor will recall, there were a long
17 series of plans of reorganization filed before the Court.
18 And only after the third plan was filed did the creditors
19 who are appearing here as movants emerge as part of a
20 negotiation process with LBHI. That process began after the
21 third plan was filed with the Court.

22 And low and behold, Your Honor will note, as we
23 put in our reply papers, there is a very big distinction
24 between the third plan and the fourth plan. The plan before
25 when the negotiations took place, and the plan after the

1 negotiation took place. The plan before the creditors were
2 committed to support the plan, and after the creditors were
3 committed to support the plan.

4 And that was the insertion of the following
5 language, that one of the duties of the plan administrator
6 knowing that there is no notice in hearing obligation under
7 the terms, has an obligation to exercise its reasonable
8 business judgment, truth, to direct, control, wind down,
9 liquidate, sell, which is a word that was not in the first
10 three versions, because we were worried about sales that
11 would be taking place, and/or abandon of the assets of the
12 debtor, and of debtor controlled entities, and what one of
13 the issues that we would like to go into in our discovery is
14 to find out the relationship between LBHI and LBHI2.

15 But now comes the most important words that were
16 added that were not there before. "Under the plan as
17 necessary to maximize distributions to the holders of
18 allowed claims." On the first three, there was no language
19 that. Under the fourth and subsequent confirmed plan, there
20 is language like that.

21 Why was that language added? The reason is
22 because it was a heavily negotiated plan. And once the
23 creditors forfeited the right to notice and hearing, they
24 needed to balance that out. They couldn't say, okay, now,
25 you can do whatever you want, you can just -- you hide

1 behind a business judgment rule that gives you carte blanche
2 to do anything particularly when you're indemnified by the
3 very source of our recoveries to begin with, so you may make
4 decisions that are erroneous, whether it's deliberate or by
5 error, and we need to have some kind of protection.

6 And therefore, we negotiated, and LBHI agreed, to
7 add language that imposed this duty, an affirmative duty
8 outside of the business judgment rule, in addition to the
9 business judgment rule to maximize value.

10 THE COURT: Let me break in, I know you're on a
11 roll, but I'm going to do it anyway.

12 What's the remedy?

13 MR. BANE: The remedy is a couple of
14 possibilities. Number one is, as we've noted in our papers,
15 we have a suspicion, and it's -- all of this is really based
16 on a valuation analysis of what is worth here. We believe
17 that this may very well be a fraudulent conveyance. We
18 believe LBHI is certainly insolvent, the claims are not
19 discharged until the end of the process, so it's insolvent,
20 and we believe that evidence will show that there's an
21 enormous amount of value not being realized on the transfer
22 of these assets.

23 THE COURT: Okay. Well, let me just break in
24 again. Which I guess you recognize not only from this
25 hearing, but others, is my habit. It seems to me that the

1 provision creates a standard of care or a standard of
2 performance for the plan administrator with respect to
3 transactions that it chooses to enter into. They're not
4 just reasonably prudent business transactions, they're
5 transactions that qualify as value maximizing.

6 The plan administrator has represented, even
7 though you don't know the facts, that this transaction fits
8 that definition. You and others like you question that.
9 Assuming for the sake of discussion that I were to permit
10 the 2004 discovery, and you were to get information through
11 a discovery process, which you would look at and then ask
12 questions about, and then either satisfy yourselves, confirm
13 that this is a value maximizing transaction, or second
14 guess. To say, wait a minute, this could be different; wait
15 a minute, that could be different.

16 What happens then? Is it your anticipation that
17 you then become part of the process of governance at
18 reorganized Lehman?

19 MR. BANE: Absolutely not, Your Honor, under no
20 circumstance are we suggesting that that should be the
21 result or the intent of this process.

22 THE COURT: But isn't it, in effect, the indirect
23 impact of what you seek because there are only two outcomes
24 it seems to me in granting the discovery requests.

25 Outcome one is that you learn information,

1 satisfying that curiosity, and determine that the
2 transaction is value maximizing. There may be other
3 transactions that could be value maximizing, but this is one
4 that fits that definition.

5 Or alternatively, you conclude, that it's a
6 transaction that is not value maximizing, or at least you
7 argue that it's not, because you say even though you're not
8 trying to be a participant that's getting in the way of what
9 Elliot and King Street are doing, there may be others that
10 would choose to do that. And say, wait a minute, we'll pay
11 more, or wait a minute, we have another idea.

12 Isn't the consequence of alternative two
13 necessarily that you're interfering in the business judgment
14 of the plan administrator? You're getting in the way. And
15 isn't that a horrific precedent, because you end up creating
16 a precedent in which the plan administrator is almost always
17 at risk of ex post review. That's not what this plan is
18 about.

19 MR. BANE: Your Honor, two points. The first
20 point is, if there is not an opportunity to review the
21 decisions made by the plan administrator, then what value is
22 there in language in a plan that imposes a duty? In
23 position of a duty must be correlating with an opportunity
24 to test actions, and determine whether the duty has been
25 violated or not.

1 THE COURT: Ordinarily when a duty is violated, it
2 leads to litigation risk. Ordinarily when a duty is
3 violated, somebody brings a lawsuit, and says, you breached
4 a duty. Or they make a claim in a letter, and then the
5 board says, we didn't breach the duty, you're wrong, let's
6 talk.

7 But there isn't, to use a First Amendment term,
8 prior restraint. And what you're seeking is prior
9 restraint, and I think that is what offends me.

10 MR. BANE: Your Honor, let me put on the table an
11 alternative way for the Court to look at this transaction,
12 and I'm not suggesting it's the case, but I'm suggesting
13 that we don't have enough information to know that it's not
14 the case.

15 A completely different way to look at what's going
16 in front of Your Honor today, maybe what happened today, the
17 two bidders, the two potential purchasers came to the debtor
18 and to LBHI2 and said, we're interested in the following
19 transaction, and we're willing to pay what you're going to
20 think is a pretty good price, and a pretty good set of terms
21 for your deal.

22 And LBHI says, well, they need my consent, they
23 need my involvement, let me see whether I should do that or
24 not. And they say to themselves, well, look, you know,
25 that's a pretty good deal, maybe there's better out there,

1 maybe not, let's go test the market. And then the bidders
2 say, no, no, no, no, hold on, I'm giving you an offer on the
3 condition you don't test the market, because if you test the
4 market, we're taking our bid off the table.

5 And then a judgment is made, well, you know what,
6 I'm not willing to take the risk that they're going to walk
7 away, I'll agree to those terms. But maybe that same
8 administrator who's looking to maximize value said to
9 himself the following, number one is I know that as a plan
10 administrator I have a fiduciary out, and therefore, if
11 someone else comes in and bids higher, I have an inherent
12 obligation to take that better deal. I'm a plan
13 administrator, I'm here only under the terms of the plan;
14 and therefore, fiduciary outs are inherent in my role.

15 So the plan administrator says to himself, I know
16 I'm making a commitment, as is the case in every bidding
17 process in Chapter 11, saying I'm getting this floor, I'm
18 getting this guarantee, but I know I have a fiduciary out.
19 So the bidders say, hey, I know this guy has a fiduciary
20 out, so how do I protect myself against that, aw, I have
21 another term.

22 You're not allowed to tell anybody what the terms
23 of this deal until the transaction is consummated, and
24 therefore, no one could bid against it. Because as the LBHI
25 keeps on saying, it's a very complicated transaction with

1 many dimensions. And therefore, if other parties don't know
2 what those dimensions are, they can't bid against it,
3 because it's behind the veil.

4 So the plan administrator says, okay, I know now
5 that they're trying to frustrate my fiduciary out, because
6 no one's going to be able to bid against it. But the plan
7 administrator says to themselves, well, you know, this term
8 that is being imposed upon me to restrict the sharing of
9 information is only if the Court does not opt -- order me
10 otherwise.

11 If the Court orders me to give the information, I
12 have to give the information. Here LBHI says to himself,
13 the administrator, with a full commitment to maximized
14 value, I could have the best of all worlds. I could get
15 this floor and commitment by these purchasers, and they have
16 no way of getting out of their commitment. And I know that
17 if these opposing parties go to the courts and have the
18 judge agree to force me to give this information, I'll have
19 to give it. And I still have the purchasers bound, and now
20 I have a fiduciary out potential, maybe someone will bid
21 higher, so I have the best of all worlds.

22 And the only obstacle to that is Your Honor giving
23 the debtor, LBHI an opportunity to get better bids. I'm
24 saying to myself, why would LBHI be here today trying to
25 frustrate an opportunity to maximize value. The answer is,

1 the primary reason they give, they have a contractual duty
2 not to. But they have never told the Court that if they
3 violate it, the purchaser walks away.

4 And frankly, Your Honor, I think they have a duty
5 to argue against our process. I think they're going to have
6 a duty to make any argument they can, and therefore you
7 can't turn to them and say, is this really true, do you
8 really want me to give this out? Of course, they can't say
9 that, that would be violating the contract.

10 But they're saying to themselves, they know that
11 Your Honor will realize that's the charade that's going on,
12 they're trying to create this floor, but the Court knows
13 that there's a fiduciary out, and the Court knows that this
14 limitation of sharing information is only until the Court
15 orders otherwise. And the only step that has to be imposed
16 to close the loop, maximize value for the estates, give
17 everybody an opportunity to see how to bid against this
18 transaction, is to grant our motion.

19 Your Honor keeps on asking, well, what happens if
20 you get the information. And the answer is not governance,
21 not intrusive, but an opportunity for other parties to bid,
22 and allow the LBHI to exercise its fiduciary out and get the
23 most value here.

24 And that I think is what the -- is expected of the
25 Court to allow LBHI to do what it really wants to do,

1 although it is barred as it said, by the terms of the
2 contract from asking the Court to do so. And therefore, I
3 ask the Court to accommodate this opportunity, which has no
4 real downside to LBHI, unless they come in and tell the
5 Court that the provisions are if the Court orders
6 information, the two purchasers have a right to walk, and
7 then we have to readdress it.

8 THE COURT: Mr. Bane, you're making a very
9 different argument from the argument that Mr. Pasquale made
10 earlier.

11 My impression from his argument was that this was
12 an inquiring minds want to know kind of argument, and
13 because of the red flags in the transaction, various parties
14 who had said they were no longer interested in participating
15 in a bidding process were still interested in getting the
16 2004 discovery, in order to verify that this was, in fact, a
17 value maximizing transaction.

18 You're saying something quite different, and in
19 your rhetoric, which is interesting for me, I'm engaged,
20 you're postulating what I'll describe as facts not in
21 evidence. You are postulating that what is really going on
22 here is a charade of sorts, in which a transaction has
23 occurred with lock-ups all over it, with the plan
24 administrator not wanting to give up that transaction
25 because of an independent judgment made that, in fact, it is

1 value maximizing, because unless that were the case, they
2 couldn't proceed with the transaction.

3 And that what you're suggesting is that they're
4 going to go through this attempt to block with a half-
5 hearted attempt your efforts to get 2004, and they will then
6 have the best of all possible worlds; the ability to
7 preserve the locked-up transaction, and the ability to start
8 negotiating with people like your client, who will say,
9 we'll pay you more, we'll do better, this is complicated,
10 but we're smart, we'll figure out how to make this better
11 for you.

12 Is that what you're telling me?

13 MR. BANE: Yes, Your Honor, and I'm suggesting
14 when the --

15 THE COURT: What's the basis for that hypothesis?

16 MR. BANE: The basis is, how absurd this process
17 was in the context of this company LBHI's behavior until
18 now.

19 The absurdity of not testing the market at all,
20 the absurdity of knowing that there is a whole array of
21 parties out there who would be more than eager to engage in
22 discussions, and not even reach out to them, it's so absurd
23 as to compel the Court to realize that this alternative
24 scenario has to be there.

25 Now, you're asking well, you don't know that

1 there's a fiduciary out; you don't know that this is
2 (indiscernible). You know why I don't know? Because we
3 don't have access to the documents, and that was a
4 deliberate effort made by the purchaser to make sure I
5 wouldn't know.

6 But to allow the purchasers to hamstring the
7 debtor, LBHI, to preclude them from exercising their
8 fiduciary out, to preclude them from giving the documents
9 which, and I'm saying -- I don't say it's half-hearted, I
10 think they're doing a very aggressive strong effort to
11 preclude us, because that's their obligation, and they're
12 very good at what they do. And they can't do it half-
13 hearted because that would make them vulnerable to the
14 purchasers arguing they're breaching their contract, and
15 that they will continue to act vociferously in favor of
16 opposing our motions.

17 But the reason they were able to conclude that is
18 value maximizing, is because they knew that it was just
19 going to be a floor, and they had the fiduciary out, and
20 there would be a scenario in which others could bid against
21 it. And what is the downside to them in doing that. What
22 is the downside of accepting my hypothesis, that maybe I'm
23 right, because Your Honor doesn't know, and I don't know,
24 and no one in the court knows except for the purchasers and
25 LBHI and LBHI2 whether all of these facts are true.

1 And we don't know because they're not allowing us
2 to know. Allow us to know. Allow somebody to know. And
3 then we could see whether this is really what the LBHI
4 wanted the conclusion to be this morning, or they were
5 really hoping, because they want to maximize value to give
6 the best of all worlds to the estate. And that's what I
7 think we're trying to find out.

8 THE COURT: Okay. There were three points you
9 wanted to make, I want you to finish making the points, and
10 then I want you to sit down.

11 MR. BANE: Okay. Absolutely, Your Honor.

12 So I've addressed the issue of the taintedness of
13 our -- of the movants and the joinders. I'm addressing the
14 entitlement to get this information, and I think I just
15 addressed the third issue, which is, why do we have a reason
16 to second guess. And the reason we have to second guess is
17 because we think that that's part of the ploy. That's part
18 of the process that was anticipated, and notwithstanding the
19 protestations that LBHI will make, from Your Honor's
20 perspective, it's readily apparent, that will only be in
21 their interest for that result to take place. Thank you.

22 THE COURT: Okay. Thank you very much. Mr.
23 Hillman.

24 MR. HILLMAN: Good afternoon, Your Honor. David
25 Hillman, Schulte, Roth and Zabel on behalf of Davidson

1 Kempner Capital Management.

2 I don't think it's necessary for me to repeat the
3 comments that you've heard from counsel who have appeared
4 before you in this case, advocating the issues that I'm
5 advocating as well.

6 But you raised some very important and basic
7 threshold issues that are troubling you, so I just wanted to
8 identify two points. This is the least efficient, least
9 desirable way for us to work constructively with the
10 reorganized debtors and their management. All right.

11 And this is not how the parties have dealt with
12 other issues that they've faced since the debtors have
13 reorganized. They have a strong working relationship with
14 the debtors and their management.

15 But the issue that's troubling Your Honor is, if I
16 understand correctly, it's not power, can you do it, it's
17 why should you do it. You're concerned about exercising
18 your discretion.

19 And so I think when you take a step back, and I
20 heard you say this at the last hearing, I was in the
21 audience in the gallery, you said, why is this happening. I
22 think that's very important to ask why is this happening.
23 Why are some of the largest creditors of LBHI holding
24 multiple billions of notional amount of allowed claims here
25 before you, what's going on.

1 That's a -- that in and of itself, if you had one
2 party who you thought was trying to get some strategic
3 advantage, maybe you shut that down. I think you need to
4 consider the fact that you have so many significant holders
5 each coming before Your Honor asking for information about
6 this transaction.

7 So then you've said to counsel, you have no
8 entitlement. What is your entitlement? Well, I think Mr.
9 Bane actually hits that issue quite clearly. If there's a
10 duty to maximize in the plan, and it's clearly set forth in
11 6.1(a), there's got to be a beneficiary of that duty.

12 And we're not asking for oversight or control, but
13 it can't be read to be a meaningless duty to maximize. And
14 here, in light of all the red flags, in light of the
15 vociferous opposition by a number of parties just for
16 information, there's something amiss here.

17 And our goal is to maximize the distribution to
18 creditors. You asked Mr. Bane, aren't there really two
19 outcomes, right, either you learn the information and you're
20 satisfied, or you're not satisfied and you're looking to
21 then get into the role of the debtor's management. I don't
22 think that's the case.

23 I think the third outcome, and the one that I'm
24 most optimistic for, is that the parties then will work
25 together in a collaborative spirit to figure out how to do

1 one thing, maximize the distribution to the holders of
2 allowed claims of LBHI. That's the single objective here.

3 THE COURT: I understand what you're saying, Mr.
4 Hillman, but at least as to your spin on the second
5 alternative, which is you get information, your group meets,
6 analyzes it, maybe hires a financial advisor to review it,
7 maybe it's an advisor in the UK, along with an advisor here,
8 you noodle over the information, and you find, as you must,
9 with that kind of an effort, something that could be
10 improved, something that might be different, some way to
11 tweak or perhaps in a major way restructure the transaction.

12 And the consequence of that, in your collaborative
13 meeting, is that creditors are marching in to some office
14 and meeting with officers of reorganized Lehman and
15 professionals for reorganized Lehman, and the Board for
16 reorganized Lehman, and saying, I don't know you could've
17 entered into this transaction, it's not a value maximizing
18 transaction, don't you see that all of our advisors, and all
19 of these creditors, we don't mean to gang up on you now,
20 think that there's a much better way to approach this. And
21 by the way, a subset of our group will be happy to step into
22 the role formerly played by Elliot and King Street, because
23 that's what's going to happen.

24 And if that happens, isn't that this group as a
25 cabal coming in to not only second-guess, but to take over

1 particular opportunity? That's what's going on here, and
2 that's the consequence of Mr. Bane's argument as well, and
3 that's what I don't like.

4 MR. HILLMAN: If that happens, I guess I look at
5 it as a good day for the reorganized debtor, right. They'll
6 have an opportunity for choice.

7 THE COURT: It's a good day when they're
8 surrounded by a bunch of enemies?

9 MR. HILLMAN: Hold on. I don't think it would be
10 fair to describe them as enemies. They are the largest
11 constituents in the case, so they are akin to shareholders
12 with shares --

13 THE COURT: They are also akin to plaintiffs.

14 MR. HILLMAN: But can I just finish this one last
15 point in response, and then I'll take my seat, and you can
16 hear from the others?

17 If, as you suggest, the reorganized debtor is
18 presented with an alternative, that in fact, is executable,
19 and allows the plan administrator to achieve greater value,
20 and the plan administrator has a choice of executable
21 options, which will yield value to the estate, I would say
22 that for the holders of allowed claims, that's good for the
23 plan administrator to have the optionality on executable
24 plans that gives them the ability to return more to
25 creditors.

1 I know that you've looked at the papers, but I
2 just want to highlight one last fact, and I'll sit down.
3 The claim being purchased is in the face amount of 1.25
4 billion pounds. The sale was for 600 million pounds, plus
5 additional consideration. And the offer that one of the
6 parties made was 250 million pounds more. It just -- it's a
7 red flag. Why not engage in some discussion about it?
8 That's all we want, is just to engage in discussion about
9 it.

10 And the plan administrator may conclude, after
11 engaging in discussion, the existing deal on the table makes
12 more sense. But we're just looking for information, and I
13 would just end on a note that I know is important to Your
14 Honor, because you've referenced it several times in this
15 hearing, and the hearing before, some level of transparency.
16 There's zero information being shared, and that hasn't been
17 the case while this plan administrator has assumed its
18 duties. This is aberrational.

19 Again, they've enjoyed a strong working
20 relationship. So when you ask yourself about whether you
21 have the power, because I think we've established that you
22 have the power, but whether or not you should exercise your
23 discretion to use it, think about the red flags, think about
24 the number of creditors who are appearing today to be heard,
25 and think about the options that it could afford the plan

1 administrator sharing -- and we don't want to do this in
2 depositions and discovery, that's not what we want. We want
3 to sit down and talk like we've done in other instances.

4 That's it. Thank you, Your Honor.

5 THE COURT: Understood, thank you.

6 MR. UZZI: Good afternoon, Your Honor --

7 THE COURT: This feels like old times.

8 MR. UZZI: It feels like old times, although I
9 know it's a new courtroom.

10 THE COURT: It's the same courtroom in a new
11 dress.

12 MR. UZZI: It looks great, Your Honor.

13 THE COURT: Thank you.

14 MR. UZZI: For the record, Gerard Uzzi on behalf
15 of the ad hoc group.

16 Although it's been almost two years now post
17 emergence, the ad hoc group, in fact, continues to be
18 active. It's not as formal as it used to be, Your Honor.
19 We do send out periodic updates to everybody that was on my
20 list prior to the emergence, but really for the purposes
21 here today, I'd just like to make some disclosures so it's
22 clear where we stand from.

23 I take direction essentially from three funds,
24 it's Paulson, Canyon, Taconic, they collective hold in
25 excess of \$10 billion of LBHI claims. They hold less than

1 400 million of Libby claims. So whether you look at
2 notional amounts or fair market value, it's clear I think
3 where our economic interests are.

4 One fund, Paulson, did participate in some of the
5 prepetition offer -- I'm sorry, pre-today offers that were
6 made, but both on an amount and number, the other funds did,
7 so I stand here solely as a representative of funds who are
8 looking out for their interests in LBHI.

9 I also want to make clear, I think it was clear
10 from our papers, and I don't think anybody else suggests
11 otherwise, but we don't have a complaint about the debtor's
12 conduct, either generally or with respect to this
13 transaction, nobody's suggesting that there's a lack of good
14 faith on behalf of the debtors.

15 What we have, and I think our group has -- and
16 we've been using the term group here today in this
17 proceeding. As I refer to the group, I refer only to my
18 clients, I don't purport to speak on behalf of anybody else.
19 We've worked constructively with the debtors for years now.
20 Notwithstanding that, we've had our disagreements with them
21 from time to time, and we've been before you on some of
22 those disagreements.

23 Today, what's important is, we have a potential
24 disagreement on a transaction and that's it. And I'm not
25 going to hit the slippery slope comments, Your Honor, I

1 think other people have addressed that. What I will say,
2 Your Honor, and it's meant to be just semantics, we didn't
3 file a joinder. We filed a statement. And that's a reason
4 for that, is that I struggled with, we struggled with
5 whether 2004 was appropriate here, and whether it's the
6 right mechanism.

7 But we struggled more with the fact that there has
8 to be some sort of mechanism here for material stakeholders
9 to come in to a case like this under the facts and
10 circumstances of the broader case, and the facts and
11 circumstances of this particular transaction.

12 It may very well be unprecedented, Your Honor, to
13 use 2004 for something like this. It's certainly unusual.
14 But this case is as unprecedented as any case, so you know,
15 I think that there's always a first time for everything.

16 I am concerned, and I think the debtor is
17 appropriately concerned, and the Court is appropriately
18 concerned about the policy questions here, and what that
19 introduces. But I also think it's balanced by the fact that
20 we have an unprecedented case.

21 We've also been two years into this case, and
22 where this is the only time anybody's been in front of the
23 Court on something like this. So I don't see the floodgate
24 opening up and the second-guessing.

25 In the particular transaction we have, though,

1 there's no dispute that this is a material transaction. I
2 mean, after all, they filed the press release. I mean, the
3 debtor's side, it's actually LBHI2 that filed the press
4 release, but they filed the press release. They felt it
5 important enough to file a press release, that put in very
6 limited facts on the transaction, that caused on everybody
7 on this side of the table, which is tens of billions of
8 dollars of claims. And I think the analogy to shareholders
9 is a pretty good analogy. To call up and say, wait, this
10 doesn't seem right to us.

11 And what we were told is that well, we can't talk
12 to you about it. So there was a negotiation that occurred
13 in secret, and I don't mean that pejoratively, it was a
14 negotiation that occurred in a -- you know, again, I'm
15 trying to avoid pejorative words, a negotiation that nobody
16 knew about, that led to a transaction that nobody can talk
17 about.

18 And the reason why it can't be talked about is
19 because the other side of the transaction requires it as
20 part of their transaction. That's the red flag, Your Honor.
21 That's the red flag.

22 If it's a value maximizing transaction, our
23 friends over at Elliot and King Street should care less
24 about the disclosure of the terms. They're the ones that I,
25 at least I understand, they are the ones that are demanding

1 that the terms not be disclosed.

2 So what do we do about it? You know, I don't know
3 whether 2004 is the appropriate remedy, but I don't accept
4 that there's no remedy here.

5 And, you know, what do we want, my group? We
6 would just like information. We would like some
7 transparency, we think it's really unfortunate that parties
8 would have to resort to formal discovery.

9 But if parties have to do that, that's only
10 because the other side is forcing the parties into a
11 position where they have to resort to formal discovery.

12 So while I appreciate and I'm very cognizant of
13 the policy issues here, and the second guessing and all the
14 rest is that they've invited this, Your Honor. This is not
15 just -- this is not a -- I noted with interest your comment
16 about an intramural dispute among, you know, huge hedge
17 funds. And I'm not going to tell you that doesn't go on, I
18 think you're well aware that does goes on.

19 THE COURT: I am well aware of that.

20 MR. UZZI: And we have lived through that
21 together, Your Honor, but this is not a situation of
22 information and balance. This is not a situation where, oh,
23 King Street and Elliot has better information than everybody
24 else, we want to get information, that's what we're here
25 for.

1 No. This is a situation about a serious concern
2 about whether this transaction, which is a material
3 transaction, they issued the press release, is truly a value
4 maximizing transaction for LBHI creditors. This is a
5 liquidating estate. This isn't a reorganized entity. It's
6 a liquidating estate. I'm not sure the same rules apply to,
7 you know, as apply if it weren't a liquidating estate.

8 And it's with that, Your Honor, that we're before
9 the Court asking the Court for some assistance in confirming
10 that it's a value maximizing transaction. I will say, Your
11 Honor, your prediction of what's likely going to happen,
12 it's my prediction too, Your Honor, because we suspect that
13 it's not, in fact, a value maximizing transaction. So we do
14 expect that somebody else will offer more money.

15 And I think the point is well taken, that okay, it
16 may be ugly how we get there, but that's actually a pretty
17 good outcome if that happens. That's it, Your Honor, unless
18 you have questions for me.

19 THE COURT: I don't.

20 MR. UZZI: Thank you, Your Honor.

21 THE COURT: Thank you. Are there others who wish
22 to speak to the right to either 2004 discovery or some other
23 assistance of the Court to gain access to information which
24 is now shrouded?

25 (No response)

1 THE COURT: Mr. Miller, it's your turn, you're up.

2 MR. MILLER: Thank you, Your Honor, good
3 afternoon.

4 THE COURT: Good afternoon.

5 MR. MILLER: Harvey Miller from Weil, Gotshal &
6 Manges on behalf of the reorganized debtors.

7 I think it's interesting, Your Honor, that Mr.
8 Pasquale and others fully agreed with your comments earlier
9 on, that the board of directors of the reorganized debtors
10 and plan administrator have acted with integrity, diligence,
11 and proper discharge of duties. And then suddenly Mr.
12 Pasquale says, but there's something fishy here. Now,
13 that's in conflict with his agreement with Your Honor's
14 comment.

15 The issue is whether it's appropriate in the
16 context of post effective date reorganized debtor being
17 subjected to 2004 examinations, which as Mr. Uzzi says, is
18 very atypical. And the cases that are cited are really not
19 on point in connection with this transaction.

20 And there's certain things we should remember,
21 Your Honor. We are talking about post effective date
22 reorganized debtors. We are talking about a transaction
23 which is taking place in administration proceedings in the
24 United Kingdom, by the administrators of LBHI2 and in
25 negotiations with that -- those joint administrators have

1 had with King Street and Elliot.

2 Just for clarification, Your Honor, the plan
3 administrator never issued a press release. The press
4 release that was issued was by the joint administrators of
5 LBHI2.

6 So we have reorganized debtors, Your Honor, who as
7 Your Honor characterized it, for debtors who are no longer
8 wards of the bankruptcy court. And if we refer, Your Honor,
9 to the Chapter 11 plan, which was confirmed with
10 unbelievable support, Your Honor, and as we have cited in
11 our papers, and I just want to cite Section 13.1 of the
12 plan, which provides authority for the debtors acting
13 through the plan administrator to take any action, including
14 without limitation, the sale of property and the entry into
15 transactions, agreements, understandings, or arrangements
16 whether in or other than in the ordinary course of business,
17 and execute, deliver, implement, and fully perform any and
18 all obligations as to instruments, documents, and papers, or
19 otherwise in connection with any of the foregoing, free of
20 any restrictions of the Bankruptcy Code, or the bankruptcy
21 rules, and in all respects as if there were no pending cases
22 under chapter or provision of the Bankruptcy Code, except as
23 explicitly provided in the plan.

24 Now, my adversaries, Your Honor, have eluded to
25 this heavily, heavily negotiated plan. Yes, it was heavily

1 negotiated. There's no doubt about that, Your Honor. And
2 these provisions were put in the plan as a result of that
3 heavy negotiation.

4 Was it ever contemplated that there would be 2004
5 examinations to question decisions made by the plan
6 administrator, and to authorize a fishing expedition? The
7 confirmation order, Your Honor, does address 2004. And it
8 says in paragraph 65, the debtors, the debtors shall retain
9 following the effective date, the same rights they had prior
10 to the effective date under Bankruptcy 2004, and this
11 Court's order granting the debtor's authority to issue
12 subpoenas for the production of documents, and authorizing
13 the examination of persons and entities, shall remain in
14 full force and effect following the effective date until the
15 closing date.

16 There is no provision any place, Your Honor, that
17 talks about a reservation that claimants under the plan to
18 use 2004. This is a very atypical process, Your Honor,
19 particularly in the context of a transaction in which the
20 reply -- the objection filed by the joint administrators
21 describes LBHI, the planned administrator as a nominal party
22 to the transaction.

23 We are an -- we, I mean plan administrator, Your
24 Honor, is an indirect creditor of LBHI2. Not a direct
25 creditor. And are there multiple issues which are at stake

1 in the UK administration proceeding that are very complex,
2 that may be rolled into this transaction. It's simply not a
3 purchase of a claim, Your Honor. It's a complex transaction
4 that was heavily negotiated by the joint administrators.

5 THE COURT: Mr. Miller, let me ask you a couple of
6 things, and you may not know the answers of your own
7 personal knowledge, which is fine, you can just tell me
8 that.

9 Do you know why this transaction is cloaked in
10 secrecy?

11 MR. MILLER: No, I do not, Your Honor.

12 THE COURT: Do you know who insisted on the
13 provisions that are in dispute today, that relate to the
14 non-disclosure of material information concerning the
15 transaction?

16 MR. MILLER: I do not have any personal knowledge,
17 Your Honor.

18 THE COURT: Did you, or did anyone from your firm
19 participate in the underlying negotiations?

20 MR. MILLER: If I can confer with Ms. Fife, Your
21 Honor, I would be happy to answer that.

22 MS. FIFE: Yes. Yes, of course.

23 UNIDENTIFIED: Yes.

24 THE COURT: Did -- Ms. Fife, are you the likely
25 suspect?

1 MS. FIFE: Not actually, Your Honor. All of the
2 negotiations took place in the UK, so it was our London
3 partners.

4 THE COURT: But your London partners did
5 participate?

6 MS. FIFE: Oh, yes, very heavily, uh-huh.

7 THE COURT: Okay. All right.

8 MS. FIFE: Yes.

9 THE COURT: Thank you.

10 MR. MILLER: I would also point out to Your Honor
11 that under the plan there are certain reporting obligations
12 on the part of the plan administration -- administrator,
13 although vested with broad authority and discretion in
14 dealing with the debtor's assets, there is a reporting
15 requirement as provided in Section 15.6 of the plan.

16 However, the plan administrator need not, in the
17 exercise of its reasonable discretion, file any reports
18 that, and I'm quoting, could place the debtors in a
19 competitive or negotiating disadvantage, or such disclosure
20 is precluded by confidentiality limitations.

21 I would assume, Your Honor, the confidentiality
22 and limitations were heavily negotiated between King Street,
23 Elliot, and the LBHI2 administrators.

24 The use of Rule 2004, Your Honor, in these
25 circumstances in an abuse of process. It is a pure

1 unmitigated attempt by the movant's hedge funds to
2 circumvent the English administration proceedings and
3 leverage their positions.

4 Rule 2004 is not an appropriate remedy in the
5 circumstances here, Your Honor. If the hedge funds are
6 dissatisfied with the transaction, they have other remedies.

7 As Your Honor pointed out, in a normal course of
8 Chapter 11 when a company emerges, and is outside of
9 bankruptcy, and there's a claim, a breach of fiduciary
10 duties, there's litigation. There is no authority in those
11 situations to use the 2004 fishing expedition ability to go
12 and do some kind of discovery to assist in creating a
13 lawsuit, or otherwise engage the reorganized debtors in very
14 expensive negotiations, examinations, production of
15 documents. That's not contemplated under this claim either,
16 Your Honor.

17 THE COURT: Mr. Miller, I have a question that I
18 think is going to be a hard one for you to answer, but I'm
19 going to ask it anyway.

20 Mr. Bane in his argument has postulated that you
21 would like nothing more than to fight the good fight, in
22 order to protect the transaction and its confidentiality,
23 and more importantly, the protect your client, the plan
24 administrator, from intrusive inquiries. But if you were to
25 lose, and some discovery were to be compelled, and the

1 result of that discovery was another transaction that was
2 even better, in terms of ultimate realization for the LBHI
3 estate and its creditors, that would be the best of all
4 worlds for you. Is that true?

5 MR. MILLER: No, sir. We're talking here, Your
6 Honor, about basic process. We have a very heavily
7 negotiated plan, which set up a process for administering
8 these assets.

9 If we lose this motion, Your Honor, we are setting
10 the precedent for every single transaction to be second-
11 guessed by maybe these creditors, maybe other creditors. It
12 is contrary to the basic premise of this plan, Your Honor,
13 and basic premise, I would say of Chapter 11. We negotiated
14 in good faith, and we expect to honor our obligations.

15 And implicit in this, as Your Honor pointed out,
16 the assumption has to be that this board of directors acted
17 with prudence, and made the determination that this was
18 value maximizing. Actually what's happening here, Your
19 Honor, somebody referred to the subordinated debt claim that
20 the LBHI2 administrators have against LBIE. There is a
21 dispute in the English proceedings, Your Honor, as to the
22 waterfall of distributions coming out of Libby.

23 The Libby administrators take the position that
24 subordinated debt claim doesn't get any distributions until
25 the holders of all allowed claims are paid interest at the

1 statutory rate.

2 King Street -- I'm sorry, Elliot takes the
3 position it's not at the statutory rate, we're entitled to a
4 lot more interest, based on our ISDA contracts. Well, if
5 that happens, Your Honor, that subordinated debt claim may
6 have the very remote chance of any significant
7 distributions.

8 What this transaction does is give down side
9 protection. It provides 650 million pounds, which I guess
10 is pretty close to a billion dollars in today's currency
11 evaluations, plus there are a lot of other terms and
12 conditions. This is a very complex deal. It's still
13 subject to documentation. But when that documentation is
14 completed, the joint administrators have the right to go
15 forward under the UK insolvency law, without any further
16 ado. So --

17 THE COURT: One further question.

18 MR. MILLER: Yes.

19 THE COURT: Do you know why confidentiality is so
20 critically important in this transaction?

21 MR. MILLER: I can only guess, Your Honor.

22 THE COURT: I don't want you guessing.

23 MR. MILLER: Okay.

24 THE COURT: Okay. Please proceed with your
25 argument.

1 MR. MILLER: I don't want to belabor it, Your
2 Honor, but the concession here is that this plan
3 administrator, the board of directors of this reorganized
4 company in the two years since confirmation, and the almost
5 two years since the effective date, have performed
6 admirably.

7 And they've done that, Your Honor, in consistency
8 with the plan, and the objective of maximizing value. That
9 has been the guiding theme of the extensive work that's been
10 done by this board of directors. And there should be a
11 deference to the decisions of this board of directors
12 without the overlay and the possibility of the kind of
13 examinations that are contemplated by 2004, which are very
14 atypical in the context of a confirmed Chapter 11, an
15 administration that is proceeding, that is making
16 distributions.

17 In addition to that, Your Honor, as I said before,
18 this is a transaction that is taking place under the English
19 insolvency laws. The joint administrators of LBHI2 have
20 filed an objection, they are opposed to these 2004
21 examinations, which may or may not include them. And I
22 believe, Your Honor, there has to be some deference of --
23 according to the joint administrators in their position, as
24 well as the conclusion and assumption that this board of
25 directors has acted properly, and in this, Judge, of its

1 fiduciary duties.

2 If they, the movants disagree with that, they have
3 other remedies, Your Honor. And to give them the broad
4 authority to pursue 2004 examinations, which as Your Honor
5 knows, is a fishing expedition, and doesn't produce
6 admissible evidence, it can only be used to impeach
7 witnesses, this is just an overlay that is contrary to the
8 very essence of the Chapter 11 plan that was confirmed and
9 the order of confirmation, Your Honor. And these motions
10 should be denied.

11 THE COURT: Okay. Thank you. Mr. Wander.

12 MR. WANDER: Good afternoon, Your Honor. David
13 Wander of Davidoff Hutcher & Citron, counsel for the joint
14 administrators of LB Holdings Intermediary 2 Limited, which
15 we were referring to as LBHI2.

16 Your Honor, I'm going to be relatively brief
17 because it's clear Your Honor has read the papers and is
18 very familiar with what's in the papers that we filed our
19 objection, and it's also clear from listening to Your Honor
20 that Your Honor knows what's going on really behind these
21 motions.

22 The bottom line is, the movants want this Court to
23 enjoin a transaction of a company in administration in
24 England, and somehow schedule a 363(b) sale of the assets of
25 the English company.

1 I'm going to briefly address two issues Your Honor
2 raised. One, value maximizing of this transaction, and two,
3 a dangerous precedent that granting the motions might result
4 in.

5 First, with regard to value maximization. As I
6 believe Your Honor gleaned from the papers, and as Mr.
7 Miller has discussed, this is a very complex transaction.
8 It's not just a sale of subordinated debt, a transaction, a
9 sale of an asset where you can have one party say what'll I
10 bid for this, do I hear a higher and better bid. There are
11 a lot of components in this that are described in the
12 papers. There are other assets of LBHI2, and there are
13 other considerations that the administrators of LBHI2 have
14 taken into account, and that Mr. Miller briefly addressed
15 that have to deal with the LBIE entity, and how its
16 distributions may impact on the LBHI2 entity.

17 And next to the carve out motion, as Exhibit F, is
18 a letter dated October 4, 2013 by Mr. Howell to the various
19 hedge funds represented by the movant parties. And I just
20 want to quote snippets from that, Your Honor.

21 THE COURT: I've read it, you don't have to quote
22 it, unless you want to make it as part of your argument, but
23 I understand what the letter says.

24 MR. WANDER: Then I'm not going to read it,
25 because Your Honor's aware that this has been reviewed,

1 analyzed by the administrators of LBHI2.

2 What the movants almost entirely ignore in their
3 papers, and as Your Honor is well aware, is we're dealing
4 with the assets of an English company that's in
5 administration, and there are procedures for challenging the
6 transaction in the English high court, and we submit, that
7 is the jurisdiction that any issue with respect to the
8 transaction should take place.

9 THE COURT: Well, Mr. Wander, I'm now going to ask
10 you a question that may make you sorry you brought that up.
11 I gather that the administrators of Lehman Brothers Holdings
12 Intermediate 2 are not bound by any value maximizing
13 provisions in the LBHI plan. And that those provisions only
14 apply to the reorganized debtors; is that correct?

15 MR. WANDER: That's correct, but they are bound by
16 the provisions that govern them and their conduct in
17 England. And I submit, that they're basically the same, in
18 that they have duties to their estate to maximize value for
19 their estate, and the ultimate beneficiary of that would be
20 the debtor before Your Honor.

21 THE COURT: Well, I understand that certainly one
22 of the beneficiaries will be LBHI, but I don't know if you
23 know the answer to this question, do you know whether or not
24 the clients that you represent in the UK have, in effect,
25 been guided by the same value maximizing principles that are

1 embedded in the plan?

2 MR. WANDER: Your Honor, I did refer to in our
3 papers the pertinent provisions of the English Insolvency
4 Act of 1986. And I believe, Your Honor, that again the
5 standards that they are governed by and any challenge to it,
6 and if anyone who has standing in the English courts
7 believes there is something untoward about this transaction,
8 they can move in the English high court for relief. And any
9 aggrieved party can do that.

10 I believe -- I don't know the specific answer to
11 Your Honor's question, vis a vis the standards of the plan,
12 but I do believe under the English law, that the
13 administrators have their fiduciary duties to their estate,
14 and that there is a certain similarity in interest between
15 what's happening with respect to the LBHI2 estate and what
16 would hopefully eventually result in this case.

17 THE COURT: Okay. Thank you. I've read your
18 papers, so I'm familiar with your position. Is there more
19 you wish to add?

20 MR. WANDER: No, that's all, Your Honor.

21 THE COURT: All right. Thank you. Is there
22 anyone else who wishes to be heard?

23 MR. BANE: I'd like to respond to a couple of
24 points if there's no one else on the objector's side.

25 THE COURT: Okay. You can fill the void.

1 MR. BANE: Very, very briefly, Your Honor, and I'm
2 sorry to elongate the session. First, I'd like to address
3 two red herrings that were just thrown out on behalf -- by
4 counsel to LBHI2. Number one is, the concept -- and the
5 LBHI objection also raised it, that this is too complex for
6 an auction, this doesn't lend itself to putting people in a
7 room and I bid this, and I bid that.

8 Your Honor, there are other ways of testing the
9 market other than an auction. And it's true, it may be
10 complex, we don't know, because we don't know its
11 provisions. But as Your Honor yourself noted in your
12 questions to me, there could very well be a better deal, and
13 not only a better deal, but an incredibly better deal, which
14 is the only reason we're making a fuss about it, because we
15 think there's an incredibly better deal that the market
16 would justify.

17 Number two is, the issue of whether this hearing
18 belongs in the UK or in the United States, the motions are
19 only related to LBHI. If LBHI was not important to this
20 transaction, it should not have been a signatory to the
21 transaction.

22 The press release and everything else in front of
23 the Court indicates that LBHI is critical to the
24 transaction. And they're critical to the transaction means
25 that LBHI holds a power to determine whether this

1 transaction should go forward or not. If they're not
2 critical, then they could walk away from it.

3 But we believe based on the information being
4 given that they are critical, and therefore, they are making
5 a decision whether this transaction is in the best interests
6 of their creditors, as reflected by their agreement to sign,
7 and that belongs in front of Your Honor.

8 I'd like to go now to Mr. Miller's argument, and
9 I'd like to point out that Your Honor's questions to him are
10 incredibly telling. Number one, who asked for the
11 confidentiality provisions, and the answer was, I don't
12 know.

13 Number two, why was the confidentiality so
14 important, I don't know. Those go to the heart of my point.
15 Unless Your Honor knows that there is a suffering by the
16 estate, rather than for the benefit of the purchasers, why
17 would Your Honor not lift that confidentiality? Because all
18 Your Honor cares about is the benefit to the estates.

19 Therefore, there are two questions that need to be
20 asked, and Your Honor, frankly it would not bother me if
21 they were asked in chambers without the movants there,
22 number one is, can King Street and Elliot walk out of the
23 transaction if the motions are granted today. Do they have
24 a right to say, we want to terminate if the motion is
25 granted. That would certainly be an argument that the

1 debtors could make to say that we would be hurt as an
2 estate, and we haven't heard that. Maybe it exists, but
3 Your Honor certainly needs to know that.

4 Number two is, in LBHI's view, if they would get
5 an offer today that would clearly be more valuable to the
6 LBHI estate by a significant amount, do they believe that
7 they have a duty and a right to take that better offer.

8 Now, if the answer to these two questions are,
9 number one, that Elliot and King Street cannot walk away,
10 and number two is if they got a better offer they would take
11 it, because that's their fiduciary duty, then I can't see
12 how Your Honor would not want to grant our motion and allow
13 us to create that opportunity. Thank you.

14 THE COURT: Okay. Thank you.

15 It's 1 o'clock in the afternoon. Has everybody
16 spoken who wishes to speak?

17 UNIDENTIFIED: Yes, sir.

18 THE COURT: Okay. I'm curiously reminded of
19 proceedings that took place in this courtroom at the end of
20 Lehman week when I was asked on very short notice to approve
21 the sale to Barclays Capital. Now, this is not the same
22 situation, but it is the same courtroom. And I was sitting
23 in the same spot.

24 And parties in interest at the very beginning of
25 this historic case stood up to say, in one form or another,

1 we don't know enough about this transaction, we need more
2 information, we need more time to test the value
3 proposition. Those of you who were here that evening recall
4 all that.

5 And the circumstances were different because we
6 were dealing with a once in a lifetime emergency. This is a
7 different set of circumstances, but I'll tell you in a
8 moment why I'm reminded of that evening.

9 I have a group of well represented, well
10 positioned, I believe well intentioned investors in the
11 capital structure of reorganized Lehman, who are, as far as
12 I can tell, genuinely troubled by the fact that the
13 transaction in question is opaque.

14 Moreover, they are troubled by the fact that they
15 know based upon what's in their own wallets, that notional
16 values might be increased if the confidentiality
17 restrictions that have been imposed on this transaction
18 could be lifted.

19 And so looking for a means to an end, namely
20 access to the information that is being withheld in
21 reference to Elliot and King Street and LBHI2, they come
22 before the Court, and they seek information by invoking the
23 tried and true discovery remedy of 2004 discovery.

24 It really doesn't apply in this situation.
25 Although I think the parties who have moved for that

1 discovery have done so with legitimate desire to obtain
2 relevant information for two purposes. First, to evaluate
3 whether the transaction in question is, in fact, a volume
4 maximizing transaction. And second, to consider whether or
5 not an alternative and more favorable transaction might be
6 structured that would be truly value maximizing, because it
7 would involve more consideration to the LBHI estate.

8 From the argument and from the papers, I
9 understand that to be the principal motivation that underlie
10 the various motions. Balanced against that, is the argument
11 made by the estate that it would be intrusive and
12 inappropriate, and an abuse of process for these well
13 positioned influential and important creditor constituencies
14 to use Rule 2004 discovery, to interfere with the decision-
15 making process of the plan administrator, and to use that
16 discovery for any purpose. Because it would be a dangerous
17 precedent to set, certainly one that could lead to further
18 instances of large and influential creditors seeking to
19 obtain information and perhaps also to interfere in the
20 decision-making process of the plan administrator.

21 As a result, I understand this to be a principled
22 dispute that involves more than just the transaction before
23 the Court today.

24 It raises the question as to whether it is truly
25 appropriate in a case such as this one, a truly one of a

1 kind bankruptcy case, for creditors to have the ability to
2 use Rule 2004 to probe transactions before they have closed.

3 In effect, what these creditors seek is the
4 ability before it is too late, to interdict a pending
5 transaction and to propose alternatives that may be more
6 favorable to the LBHI estate.

7 On the one hand, that's a good thing. On the
8 other hand, that's a bad thing. Here's why it's a bad
9 things.

10 The plan has been structured in a manner that
11 delegates authority to a professional and experienced board
12 of directors. That board, consistent with class corporate
13 governance principles, has since the effective date made
14 business decisions consistent with the prescriptions in the
15 plan that transactions be value maximizing.

16 There has been no showing that the transaction in
17 question is anything other than value maximizing. Instead,
18 we have references to confidentiality, red flags, and the
19 fact that certain self-interested members of the group
20 seeking discovery have themselves indicated an interest in
21 paying more.

22 But because we don't know what's inside the
23 transaction structure, it is impossible to know whether
24 outsiders can actually pay more. It is impossible to know
25 whether or not this is truly a situation in which

1 competitive bidding makes any sense at all.

2 Additionally, we are dealing with proceedings in
3 London that involve two separate estates in administration,
4 the estate of LBI2 and the estate of LBIE. I don't know,
5 and I'm not in a position to judge the standards that are
6 being applied by the administrators of the estate of LBI2.
7 And I do not accept Mr. Wander's representation as to the
8 English Insolvency Law of 1986, as being the functional
9 equivalent of a carefully negotiated plan provision that
10 calls for value maximizing transactions.

11 But I do know from my experience, that
12 administrators of UK insolvency cases tend to be very
13 jealous of their prerogatives, and also tend to be very
14 careful not to do anything that might give rise to potential
15 liability.

16 In part for that reason, but certainly not based
17 on that, I have no factual basis on which to make an
18 adjudication one way or the other, that there is anything
19 about this transaction that is truly suspect. No facts have
20 been presented, only suspicions.

21 For that reason, and also because I don't know
22 what the consequence truly will be in breaching the
23 confidentiality that currently cloaks the existing
24 transaction, I am not prepared to grant the 2004 requests
25 that are pending.

1 I believe that the parties are not without remedy,
2 however. This transaction, which has been outlined in a
3 press release, the details of which I know virtually nothing
4 about either will close or it won't. The conditions to the
5 transaction, whatever they may be, will either be fulfilled,
6 or they won't.

7 This is one albeit significant transaction in the
8 portfolio of significant transactions that make up the
9 history of this bankruptcy case. I am not prepared today to
10 create a precedent that I think is unwise.

11 Creditors will have their remedy if, as and when
12 the transaction closes, assuming they are able to establish
13 that there has been any material deviation from the plan
14 standard, that the transaction be value maximizing.

15 I believe on reflection that it is a much better
16 structure for the company to be managed by its board, for
17 transactions to be entered into consistent with traditional
18 notions of corporate governance as modified by plan
19 provisions, and for the parties in interest who may later
20 question whether or not those standards have been met, to
21 exercise such remedies as are available to them.

22 The alternative is for parties in interest to
23 being engaged in what I have earlier described as prior
24 restraint, an effort through discovery and colloquy to
25 influence the decisions of the board. In my judgment, that

1 is entirely inappropriate.

2 For the reasons stated, the motions are denied.

3 Now, I'll tell you why I think this is very much like what
4 happened on the night of September 19.

5 As today, parties argued we don't know enough. It
6 is not my job to know everything, because I can't. It is my
7 job to exercise discretion based upon what's presented, and
8 to try to apply a Hippocratic oath kind of structure upon
9 what we do here, first do no harm.

10 Because in the case of the Barclays transaction,
11 there was no other transaction, it would have caused harm to
12 delay that transaction. Here, to open up discovery causes
13 potential harm both to the existing transaction and to the
14 governing structures that are in place in this very
15 successful bankruptcy case.

16 I choose to do no harm. And for that reason, have
17 exercised discretion in the manner just described.

18 Now, I have another matter from the morning
19 calendar. I'm going to suggest that we take a ten minute
20 break, and I will see everybody from the first matter at
21 1:30 to discuss what happens next.

22 (Recessed at 1:17 p.m.; reconvened at 1:30 p.m.)

23 THE COURT: Be seated, please.

24 Let me tell you what I've concluded. Today has
25 been a somewhat longer than anticipated day for me, and as

1 some of you know, I have an important chambers conference
2 this afternoon at 3 o'clock, that will require some
3 preparation.

4 I have determined that it makes the most sense for
5 this motion to reclassify the claim to be adjourned to the
6 November hearing date. The November hearing date on claims
7 is currently scheduled to be November 21, but that date
8 needs to change. And it will be November 22.

9 In deciding that I have the authority both to deny
10 a motion to stay, and also to control my docket, I am
11 hopeful that the parties might be able to use the time
12 between now and the next hearing to explore what might have
13 been explored in the mediation described by Mr. Canning,
14 that was to have taken place in November coincidentally.

15 That doesn't mean that I'm directing that the
16 parties go to mediation, they can do that if they wish, or
17 they can talk on their own if they wish, or you can choose
18 to be respectful to one another, but not talk, it's entirely
19 up to you. And I hope you do talk.

20 MR. PEREZ: Thank you, Your Honor. I'm sure we'll
21 talk.

22 THE COURT: Okay. So I'll see you next on the
23 22nd of November, assuming that works for the parties.

24 MR. PEREZ: It works for us, Your Honor.

25 MR. CANNING: Yes, that's fine, Your Honor.

1 MR. PEREZ: Thank you.

2 THE COURT: Okay. Thank you. And some of you I
3 think I will see at 3 o'clock.

4 (Proceedings concluded at 1:32 PM)

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I N D E X

R U L I N G S

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C E R T I F I C A T I O N

I, Sheila G. Orms, certify that the foregoing is a
correct transcript from the official electronic sound
recording of the proceedings in the above-entitled matter.

Dated: October 26, 2013

Sheila Orms

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